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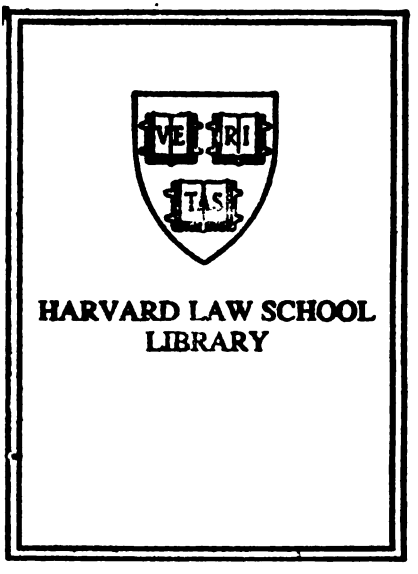

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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

DECEMBER 16, 1902, TO APRIL 21, 1903

JOHN A. BROOKS
STATE REPORTER

VOL. 132

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EDWARDS *v.* MICHIGAN TONTINE INVESTMENT CO.[1]

1. EQUITY JURISDICTION—FRAUDULENT CONTRACT.
   Where a bill alleges that complainant has paid money to a corporation under a contract not wholly illegal, supposing it was legal and acting in good faith, while defendants knew that the business to be transacted under the contract was a cheat and a fraud, the parties are not *in pari delicto*, and equity has jurisdiction to compel an accounting.

2. SAME—REMEDY AT LAW—PLEADING.
   A demurrer to a bill on the ground that complainant has an adequate remedy at law should be overruled, where the bill alleges that defendants, the directors and stockholders of a corporation, conspiring together, obtained complainant's money by means of fraud, that the corporation did a large business, is insolvent, that defendants have converted the money taken in by the corporation, and prays for an accounting and an examination of the books.

Appeal from Ionia; Stone (George P.), J., presiding. Submitted October 17, 1902. (Docket No. 91.) Decided December 16, 1902.

Bill by Minnie L. Edwards against the Michigan Tontine Investment Company and others for an accounting. From an order overruling a demurrer to the bill, defendants appeal. Affirmed.

John T. Mathews, for complainant.

A. A. Ellis, *Allen B. Morse*, and *F. C. Miller*, for defendants.

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* Continued from Vol. 131.

[1] Rehearing denied March 23, 1903.

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MOORE, J. This is an appeal from an order overruling a demurrer to a bill in equity. This bill was filed against the Michigan Tontine Investment Company, a corporation. The incorporators and stockholders of said corporation are individually, jointly and severally, made parties defendant. The prayer of the bill is for an accounting on the part of said corporation, and on the part of the stockholders and officers individually, of the funds which came into the hands of said officers, for an injunction restraining the officers and stockholders from paying out or appropriating any of the funds of the company, and for discovery of all matters and things pertaining to said corporation; and the prayer for relief is for decree against the said corporation, and the stockholders and incorporators personally, for the amount of money paid in by the complainant, with interest thereon.

The bill alleges the incorporation of the defendant tontine company, and its purposes, as stated, "to buy, sell, manufacture, and deal in all kinds of jewelry, gold, silverware, precious stones, scientific and musical instruments, and any business naturally appurtenant to the same or connected therewith;" that the said corporation was capitalized at the sum of $5,000; and that the period for which it was incorporated was 30 years. The bill next alleges an unlawful confederacy by and between the original incorporators and the others who subsequently associated themselves as stockholders to use the corporate name as a cloak to cover up and protect them in the doing of an unlawful business; that an office was opened at the city of Ionia; and that the said incorporators and their agents commenced to solicit business upon a so-called diamond investment contract, the details of which are fully set up. The bill further alleges the manner of soliciting business, and the unlawful, untrue, and fraudulent representations made and held out to complainant and the public in general, which induced complainant to place her money with said defendants; that, in pursuance of the alleged contract made by complainant with said defendants, she (complain-

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ant) paid to defendants the sum of $800 upon 10 of said contracts; that she made a demand for her money, and was offered for her contracts $300. It further charges, on information and belief, that the said defendants had, at the time said demand was made, large sums of money in their hands, which they had received from complainant and other persons who had contributed to said funds, which they were secreting with the intention of converting the same to their own use. It further alleges that said contracts were *ultra vires* and wholly illegal and void as contracts, and that, at the time said defendants issued said contracts under said corporate name, they knew they were *ultra vires* and void, and that they used the corporate name and character as a cloak to shield themselves from individual liability in the doing of an unlawful business. Complainant further charges that the said defendants are jointly and severally liable to complainant for said fraudulent representations, and that they are trustees of the funds in their hands which came from complainant and others, and are answerable as such.

The bill further charges that defendants individually have withdrawn to themselves, refunded, and appropriated to their own use large sums of the funds of complainant and others in their hands; that the money paid by complainant to said officers was paid through fraud and misrepresentation of the stockholders, officers, and managers, and was paid without consideration. The bill then charges directly that Thomas B. Waring, one of the defendants, who was acting on his behalf and on behalf of the other defendants, solicited complainant to go into said business by means of false and fraudulent representations. The bill further charges that, at the time it was filed, the said defendants were claiming that, by reason of the opinion of the attorney general of the State of Michigan, they were unable to longer do business on said investment contract plan, and claiming that they were not liable to refund to complainant the money she had paid in, or any money whatever; that by reason of said premises she

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(the complainant) is entitled to recover from said corporation, or the officers thereof, any funds that may be now in defendants' hands or under defendants' control, not exceeding the amount she has paid in, with interest thereon, and that she is entitled to a personal decree against the defendants for any deficiency that may exist; and that all of said defendants, whether officers, directors, or stockholders, are jointly and severally personally liable and subject to a personal decree against them individually. The bill further alleges that the funds of this complainant are now held in trust for her as funds paid without consideration, such payment having been induced by such false, fraudulent, and illegal representations, and that the same ought, in equity, to be recovered from the parties who have received the same and have appropriated the same. Said paragraph also charges that complainant acted in the utmost good faith, fully believing that the said corporation had full power, right, and authority to make and carry out the contract so offered by him, the said Waring.

The bill then claims the right of discovery of the books, records, and *memoranda*, and all things pertaining to the said corporation and its business, in order that she (the complainant) may determine and know what, in justice and equity, belongs to her of the funds now in the hands of said corporation. The bill further charges in that connection that the said stockholders, officers, and directors have mixed and intermingled the funds now rightfully belonging to complainant with their own funds, and that, unless restrained by the court, they will dispose of their money, and the complainant be deprived of her remedy. Then comes the prayer of the bill, as previously stated.

This bill was demurred to by the several defendants for many reasons, which it will not be necessary to state. The important ones are two in number: *First*, because the complainant purchased the contract with full knowledge of its conditions, and never intended to buy any diamonds, but to receive 50 per cent. on her money; that she aided the corporation in violating its charter, if it was vio-

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lated, and is *in pari delicto* with defendants, and the law will leave the parties where they have left themselves.

Contracts of a similar character to the one involved here were before the court in *Rehberg* v. *Surety Co.*, 131 Mich. 135 (91 N. W. 132), and *Barney* v. *Surety Co.*, 131 Mich. 192 (91 N. W. 140), in which cases it was held these contracts were not gambling contracts, within the meaning of the law, and were not wholly illegal. It is true that in one of the cases the business was characterized as a cheat and a fraud. The complainant, in her bill, alleges substantially the same thing, and that the defendants had knowledge of its character, while she did not, but, on the contrary, she supposed the business was legal, and acted in good faith.

The second important ground for demurrer is that complainant has a complete and adequate remedy at law; counsel citing, among others, the two cases mentioned above. It is not always true that, because a remedy might be pursued upon the law side of the court, the chancery side may not also have jurisdiction. The bill alleges that complainant's money was obtained from her by means of fraud; that defendants conspired together, and were parties to the fraud; that a large business was done by the corporation; that it is insolvent; that defendants have converted the money taken in by the corporation, including the complainant's money, to their own use; that an accounting is necessary, and an examination of the books of the corporation. If the case stated in the bill is true,—and it must, on demurrer, be deemed to be true,—under the repeated decisions of this court the chancery side of the court has jurisdiction. *Wheeler* v. *Bank*, Har. Ch. 449; *Wallace* v. *Harris*, 32 Mich. 380; *Wyckoff* v. *Machine Co.*, 43 Mich. 309 (5 N. W. 405); *Tompkins* v. *Hollister*, 60 Mich. 470 (27 N. W. 651); *Sherman* v. *Stove Co.*, 85 Mich. 169 (48 N. W. 537); *Cogswell* v. *Mitts*, 90 Mich. 353 (51 N. W. 514); *Warren* v. *Holbrook*, 95 Mich. 185 (54 N. W. 712, 35 Am. St. Rep. 554); *John Hancock Mut. Life Ins. Co.* v. *Dick*, 114

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Mich. 337 (72 N. W. 179, 43 L. R. A. 566); *Blodgett* v. *Foster*, 114 Mich. 688 (72 N. W. 1000, 68 Am. St. Rep. 504); *Lieberman* v. *Sloman*, 118 Mich. 355 (76 N. W. 757); *Mactavish* v. *Kent Circuit Judge*, 122 Mich. 242 (80 N. W. 1086); *Noble* v. *Grandin*, 125 Mich. 383 (84 N. W. 465).

The order of the circuit court is affirmed.

HOOKER, C. J., GRANT and MONTGOMERY, JJ., concurred.

MAY *v.* ULLRICH.

1. WITNESSES—OFFICER OF BANK—ESTATES OF DECEDENTS.
   Where, in a proceeding in equity by the receiver of an insolvent bank to enforce an assessment against the estate of a stockholder, it was stipulated that the testimony of the cashier should stand as the testimony of the bank commissioner, such evidence is competent, although the cashier, as an officer of the bank, was disqualified to testify to those facts which were equally within the knowledge of the deceased person.

2. INTEREST—ASSESSMENT ON BANK STOCK.
   Interest is recoverable upon an assessment by the receiver of an insolvent bank against a stockholder, when such assessment is past due and not paid on demand.

Appeal from Ingham; Wiest, J. Submitted October 17, 1902. (Docket No. 88.) Decided December 16, 1902.

Bill by John A. May, receiver of the Ingham County Savings Bank, against Paul J. Ullrich, administrator of the estate of Paul Ullrich, deceased, impleaded with James R. Trimble, to enforce an assessment on stock. From a decree for complainant, defendant appeals. Affirmed.

S. L. Kilbourne, for complainant.

Black & Dolan, for defendant.

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HOOKER, C. J. On November 1, 1886, Paul Ullrich, of Mt. Clemens, since deceased, became the owner of and received a certificate for 10 shares of the capital stock of the Ingham County Savings Bank of Lansing, Mich., and the same was held by him when the bill was filed in this cause. On October 23, 1893, he became the owner and received a certificate for 50 shares of said stock, and continued to own the same until July 27, 1896, on which day his son and present administrator, under instructions from his father, surrendered the certificate for cancellation, requesting the issue of a new certificate to one James R. Trimble. On August 6, 1896, the bank voluntarily closed its doors, was taken in charge by the State banking commissioner, and on August 13, 1896, was decreed to be insolvent. The complainant is the receiver appointed by the court. On July 26, 1897, an assessment of 65 per cent. of the stock was made by order of the court upon petition of the receiver, which petition stated the transfer of the stock from Ullrich to Trimble, and alleged that it was fraudulent and void. Demand of payment was made upon Ullrich, and refused, and the bill in this cause was filed to collect the assessment, both Ullrich and Trimble being made parties defendant. Ullrich died before answer, which was subsequently filed by his son and administrator. The bill was taken as confessed against Trimble. The bill was dismissed as to Trimble, and a decree was entered in favor of the receiver against the administrator, who has appealed.

Three questions only need consideration: (1) Was the bank insolvent when the stock was transferred to Trimble? (2) Was such transfer fraudulent? (3) If the first two questions be answered in the affirmative, should the receiver recover interest upon the amount assessed upon this stock?

1. Counsel for defendant do not appear to discuss the first question stated above, but the fact of insolvency is denied in the answer, where it is said that the court had not jurisdiction to make the order of assessment. We do not find anything in the proofs showing that the order is

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void, and the evidence convinces us that the bank was insolvent. It is unnecessary, therefore, to discuss the legal questions that might be raised upon a different record relating to this subject.

2. Were we to treat all of the testimony offered upon the hearing as competent, there would be no lack of evidence to support the complainant's contention; but much of this testimony was given by Dr. May, the receiver and cashier of the bank, by two other witnesses,—Pratt and Esselstyn, —who were directors, and by Trimble; and counsel for the appellant contend that much of their testimony was inadmissible under the statute (3 Comp. Laws, § 10212, which excludes interested parties from testifying to matters equally within the knowledge of one deceased), upon the ground that the first three, being officers of the bank, are excluded by the express terms of the statute, and that Trimble is within its spirit for the reason that, if Ullrich should not be held liable, he (Trimble) should be.

There is much force in this claim of appellant's counsel. Dr. May gave testimony concerning a transaction which occurred on July 16th, on which occasion both the cashier and Ullrich were present, with other officers of the bank and the State banking commissioner. The record contains a stipulation that the cashier's testimony regarding this meeting should stand as the testimony of the bank commissioner, whom it was inconvenient to call. We are of the opinion that this testimony discloses circumstances which make it improbable that Mr. Ullrich, the president of the bank, was ignorant of the straitened condition of the affairs of the bank, and, together with Trimble's pecuniary condition and business relations with Ullrich, as shown by the testimony of the younger Ullrich, justify the conclusions reached by the learned circuit judge, both as to Ullrich's design and Trimble's willingness to aid him in avoiding his personal liability. We may therefore disregard the questionable testimony, and still find the bill sustained by the evidence.

3. The remaining question, relating to the interest,

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needs little discussion. The claim was liquidated by the assessment, and, not being paid when due, interest is recoverable as upon any other overdue obligation.

The decree of the circuit court is affirmed, with costs.

MOORE, GRANT, and MONTGOMERY, JJ., concurred.

OESTERREICH *v.* FOWLE.

1. REMOVAL OF POLICEMAN—TRIAL—APPEARANCE—WAIVER.
   An appearance and trial on the merits, before a police commissioner, of a charge to remove a policeman, under Act No. 416, Local Acts 1901, waives the requirement that the complaint should be under oath.

2. SAME—COMPLAINT—OFFENSE—SPECIFICATIONS.
   To determine what offense a policeman was charged with, and of what he was convicted, in a proceeding to remove him from office, the specifications must be examined, rather than the general language in the complaint and order of dismissal.

3. SAME—POWER OF POLICE COMMISSIONER—DEPARTMENT RULES.
   It is provided by sections 5 and 10 of Act No. 416, Local Acts 1901, that the police commissioner of Detroit shall have power, for cause assigned, to remove and suspend policemen from office, and that any citizen or police officer may make a complaint touching the character or conduct of any policeman, or for violation of any of the rules of the police department, and that the police commissioner may make an order of removal of the accused officer. *Held*, that the commissioner's authority to remove is not limited to a violation of the rules of the department.

4. SAME—ABSENCE FROM DUTY—FALSE REPORT.
   A charge that a policeman reported himself sick, when he was at home, engaged in manual labor, "showing falsehood and deception in his report to his superior officers, prejudicial to good order and discipline," is more than a charge of absence from duty, and, upon conviction thereof, the commissioner is not limited to the penalty fixed by the rules for the latter offense.

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Certiorari to Wayne; Donovan, J. Submitted November 18, 1902. (Calendar No. 19,623.) Decided December 16, 1902.

Mandamus by Robert R. Oesterreich to compel George W. Fowle, police commissioner of the city of Detroit, to revoke an order dismissing relator from the police force. From an order denying the writ, relator brings *certiorari*. Affirmed.

Palmer & Palmer, for relator.

John J. Speed, for respondent.

CARPENTER, J. This is a proceeding to review the action of the circuit court for the county of Wayne in denying relator a *mandamus* compelling respondent to vacate an order dismissing him from the police force of the city of Detroit.

On June 2, 1902, the following charge was preferred against relator:

"HON. BOARD OF METROPOLITAN POLICE COMMISSIONERS OF THE CITY OF DETROIT: I hereby prefer the following charges against Doorman Robert R. Oesterreich:

"Charge, conduct unbecoming an officer.

"Specification 1st: Doorman Robert R. Oesterreich reported as being sick on the evening of May 19, 1902, and was absent until May 24, 1902, and carried on the time-book as reported sick, during which time he was at his home, engaged at manual labor; showing falsehood and deception in his report to his superior officers, prejudicial to good order and discipline.

"Witnesses:

"ALBERT M. STODDARD, Lieutenant.

"PETER JOCQUES, Sergeant.

"JOHN HIGGINS, Sergeant.

"Respectfully submitted.

"A. BAKER,

"Captain."

On June 3, 1902, a copy of said charge was served on relator, with a written notice that he must furnish an answer in writing within three days. Relator filed a

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sworn answer, substantially denying the charge made against him. A hearing was had, at which relator appeared, and testimony was introduced which satisfied respondent that relator "had not only been engaged in manual labor during the time he was absent, but that the labor was of a kind which showed that relator had been guilty of falsehood and deception in reporting himself sick." On June 30, 1902, the following order was promulgated:

"Doorman Robert R. Oesterreich, arraigned on June 5, 1902, charged with conduct unbecoming an officer and neglect of duty, in that he was doing manual labor on his own premises whilst reporting himself unable to do police duty, was found guilty, and sentenced to be dismissed from the force, to take effect July 1, 1902."

Relator contends that he is entitled to a *mandamus* on two grounds: *First*, that "the commissioner of police had no jurisdiction to try and remove the relator in these proceedings had before him, the complaint required by the statute not having been sworn to;" *second*, that, "if he [respondent] had jurisdiction to try him [relator], no offense was charged in the complaint, and his [respondent's] findings and sentence were irregular and illegal."

1. Section 10 of Act No. 416 of the Local Acts of 1901 required the complaint to be on oath. We think, however, that the relator waived this requirement by not raising this point at the hearing, and proceeding to a trial upon the merits. This is in no sense a criminal proceeding, nor is it like a criminal proceeding, and therefore the authorities relating to criminal proceedings, relied upon by relator's counsel, have no application.

2. Did the complaint charge such misconduct on the part of the relator as to justify his dismissal from the force? In effect, the relator is charged with procuring himself to be carried on the time-book as sick, when in fact he was at home, engaged in manual labor, "showing falsehood and deception in his report to his superior officers, prejudicial to good order and discipline." He is found

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guilty of this precise charge, as is apparent by closely examining the order promulgated June 30, 1902. There is nothing to justify the argument of relator that he was charged with "conduct unbecoming an officer" and convicted of "neglect of duty," because, to determine what he was charged with, and what he was convicted of, we look at the specifications, and not at the general language contained in the complaint and order of dismissal.

It is urged that, under the law governing this case (Act No. 416, Local Acts 1901), relator could be removed only for conduct which violated rules and regulations of the police department, and that such rules and regulations were not violated by the misconduct charged in the complaint against relator. We cannot agree with relator in his position that he could not be removed except for violation of the rules and regulations of the department. Section 5 of the act under consideration provides:

"Said commissioner shall also have power, for cause assigned, * * * to remove and suspend from office."

Section 10 provides:

"Any citizen of Detroit, or officer of the police force, with a view to the trial and suspension or removal from office of any officer or patrolman of the police force, may, on oath, in writing, prefer or make * * * charges or complaint touching the character or competency, or affecting the acts, conduct, or omissions, of such officer or patrolman, or for violation of, or misconduct as defined or prescribed by, the rules and regulations of the police department; and said commissioner of police * * * may make an order of removal or suspension for some certain period, or may impose a fine, to be deducted from the pay of the officer accused."

In our opinion, the foregoing provisions give ample power to the commissioner to try and remove any member of the police force for other cause than violations of the rules and regulations of the police department. We cannot think it was intended by this act to compel the commissioner to retain, as a member of the force, a man

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guilty of such falsehood and deception as that charged, and, as we must assume, proved, against the relator in this case.

Relator also urges that the charge made against him was that of absence from duty only, for which the maximum penalty prescribed by the rules of the department was forfeiture of pay during the time absent. What has been stated respecting the charge made against relator sufficiently shows that, in our opinion, he was charged with something more than mere absence from duty.

It results from these views that we think the court below correctly disposed of this case, and therefore his order will be affirmed.

The other Justices concurred.

JONES v. CODY.

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157 635

PUBLIC SCHOOLS—ENFORCEMENT OF RULES BY TEACHER—AUTHORITY OVER PUPILS AFTER SCHOOL.

A principal of a public school, who enforces a rule of the school board requiring pupils to go directly home at the close of school, adopted under a statute conferring authority on the board to make rules relating to the good government of the schools and the welfare of the public concerning the same, is not liable for the damages sustained by the owner of a store arising from a loss of trade due to such enforcement.

Error to Wayne; Brooke, J. Submitted November 19, 1902. (Docket No. 98.) Decided December 16, 1902.

Case by John P. Jones and Catherine Jones against Frederick Cody to recover damages for a loss of trade. From a judgment for defendant on verdict directed by the court, plaintiffs bring error. Affirmed.

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Counsel for appellants has made no statement of the case as provided by Sup. Ct. Rule 40, which reads as follows:

"The brief of a party bringing a cause into this court shall contain a clear and concise statement of the facts of the case, distinct from argument, and of the errors upon which he relies, the questions involved, and the manner in which they are raised. The court will consider such statement sufficient and accurate unless the opposite party shall point out in his brief wherein the statement is insufficient or inaccurate."

We might affirm the judgment for this reason, but, as the case is one of considerable importance, we will dispose of it on the merits. Defendant's counsel has made a clear statement, which we have verified and find correct.

The plaintiffs are the owners of a small confectionery store situated opposite the Webster School, one of the public schools of the city of Detroit. Mrs. Jones had full charge of the business. The defendant was principal of the school. The schools are under the control of the board of education, which derives its powers from a special act of the legislature. Section 8 of the act gives the board—

"Authority to make by-laws and ordinances * * * relative to the employment and examination of teachers, their powers and duties; relative to the regulation of schools, and the books to be used therein; * * * relative to anything whatever that may advance the interests of education, the good government and prosperity of the free schools in said city, and the welfare of the public concerning the same." Laws 1869, No. 233.

This controversy arises over the enforcement of rule 87, subdivision *c*, which provides that "pupils are required to go directly to their homes at the close of school at noon and at night, unless required or specially permitted by their teachers to remain." This has been a rule of the board for many years. In the fall and winter of 1899 the defendant had not required a strict compliance with this rule. It was his habit, after the various rooms had been dismissed at noon and night, to go around, straightening

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up his affairs inside the school building. He then went to the principal's room, got his coat and hat, and started for home. This occupied about 10 minutes after the pupils had been dismissed. In passing out of the school block, if he noticed any of the boys loitering in the streets, he told them to go home; and if they were in the stores he stepped to the door, or inside, and said: "Come, boys, your time is up; you must go on home."

Plaintiffs found no fault with the rule or method of enforcement until January 10, 1900. On that date the principal, seeing some of the boys in plaintiffs' store, stepped inside, as had been his custom, to send them on their way home. He was then informed by Mrs. Jones that she did not wish him to come into her place of business to order the boys out, and he at once informed her that, if not allowed to enforce the rule in the manner he was enforcing it, he would be obliged to enforce it strictly, and require the pupils to go directly to their homes at the close of school sessions. In the interval between January 10 and February 14, 1900, the trouble was brought to the notice of the superintendent of schools, and also the committee of the board on teachers and schools. Mrs. Jones made a complaint in person to the superintendent, and wrote a letter and called upon Mr. Love, the chairman of the committee. Mr. Cody went to the superintendent for instructions, and later appeared before the committee. From both the superintendent and the committee he received instructions to enforce the rule, and accordingly on February 14, 1900, he had the teachers read the rule to the pupils in the various rooms of the school. It is this action in enforcing the rule strictly in accordance with its terms of which plaintiff makes complaint. She says her trade, which amounted to $5 or $6 per day, "fell off right away;" and because, as she claims, the enforcement of this rule of the board lessened her trade with the scholars, she brings this action against the defendant, who was carrying out the instructions of his superiors. The court directed a verdict for the defendant.

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James H. Pound, for appellants.

Arthur Webster, for appellee.

GRANT, J. (*after stating the facts*). No malice is alleged in the declaration, and none shown by the proofs. The assertion of plaintiffs' counsel that defendant acted *malo animo* has not even a shadow for a basis. No fault is or can be found with the manner in which the defendant enforced the rule. Plaintiffs made no objection to defendant's method until Mrs. Jones requested him not to enter her store to notify the pupils to go home. He then ceased doing this, and, by the direction of the committee, caused the rule to be read to the pupils in all the schoolrooms. This action was commendable, and obedience on the part of the pupils was equally commendable. The rule and the method of enforcing it are reasonable, unless it be the law that those in control of our public schools have no jurisdiction over pupils outside the schoolhouse yard. It is not only the legal right, but the moral duty, of the school authorities, to require children to go directly from school to their homes. All parents who have a proper regard for the welfare of their children desire it. The State makes it compulsory upon parents to send their children to school, and punishes them for failure to do so. The least that the State can in reason do is to throw every safeguard possible around the children who in obedience to the law are attending school. The dangers to which children are exposed upon the streets of cities are matters of common knowledge. Humanity and the welfare of the country demand that a most watchful safeguard should, so far as possible, accompany children, when required or allowed to be on the streets. Parents have a right to understand that their children will be promptly sent home after school, and to believe that something untoward has happened when they do not return in time. In no other way can parents and teachers act in harmony to protect children from bad influences, bad companionship, and bad morals. No trader or merchant has the constitutional right to have children

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remain in his place of business, in order that they may spend money there, while they are on their way to and from school. The liberty of neither the child nor parent nor trader is at all unlawfully restrained by this rule and its reasonable enforcement. The rule does not interfere with the right of the parent to send his child upon an errand, to a store or other reputable place, or to the home of a relative or friend to visit. Neither does it restrict the authority of parents over their children. This action on the part of the school board of the city of Detroit and its teachers is fully sustained by the authorities. *Lander* v. *Seaver*, 32 Vt. 120 (76 Am. Dec. 156); *Deskins* v. *Gose*, 85 Mo. 485 (55 Am. Rep. 387); *Sherman* v. *Inhabitants of Charlestown*, 8 Cush. 160; Mechem, Pub. Off. § 730.

Judgment is affirmed.

The other Justices concurred.

DELRAY LUMBER CO. *v.* KEOHANE.

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1. HOMESTEAD—RESIDENCE.

One who resides on property owned by himself cannot claim a homestead in another parcel upon which he is at the time erecting a dwelling.

2. SAME—MECHANIC'S LIEN—EVIDENCE.

In a suit to enforce a mechanic's lien upon a dwelling, defendant claimed the house was her homestead, and testified that, while it was being built, she lived on a certain street in a house which she did not own, and that she had no other property in the city than that involved in the suit. Complainants put in evidence a deed executed by her after the lien had attached, conveying a lot on the street upon which she lived. *Held*, that the circuit judge was justified in discrediting her testimony, and his finding that the property involved in the suit was not her homestead would not be disturbed on appeal.

3. BUILDING CONTRACT—CHANGES—WAIVER—LIEN.

Such changes by the owner from the original contract as are

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frequently made, in good faith, during the construction of a house, do not constitute such a waiver of the contract as will exclude its terms in determining his liability under the lien law.

4. PROMISE TO PAY SUBCONTRACTOR—LIEN.
A promise by the owner of a house to pay a subcontractor a balance due him from the contractor would not establish a lien against the owner's property which did not otherwise exist.

5. ABANDONMENT OF CONTRACT—COST OF COMPLETION—LIENS.
Where a contractor has abandoned his contract for the construction of a house, subcontractors and materialmen are entitled to liens for such a proportion of the amount of their claims arising before the abandonment as the contract price is of the actual cost of constructing the house in accordance with the original contract.

Appeal from Wayne; Donovan, J. Submitted November 19, 1902. (Docket No. 99.) Decided December 16, 1902.

Bill by the Delray Lumber Company and Joseph E. Hugg and Albert Oltz, copartners as Hugg & Oltz, against Katherine Keohane and James Scheel, to enforce mechanics' liens. From a decree for complainants, defendant Keohane appeals. Reversed.

Wilkinson & Younglove and *Alex. M. Rea*, for complainants.

James H. Pound, for appellant.

CARPENTER, J. This is a chancery suit to enforce two mechanics' liens against the property of the first-named defendant. The first-named complainant claims a lien by reason of lumber furnished in the construction of a house for the defendant Keohane. The other two complainants are partners doing business under the firm name of Hugg & Oltz. They claim a lien for the balance unpaid on a contract to do the masonwork on said house, and for labor performed in lathing said house. The court below decreed the enforcement of these claims at their full amount.

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Defendant Keohane appeals. She claims that the decree should be reversed on two grounds: *First*, that the property in question was the homestead of defendant Keohane, and that, as the complainants' contracts were verbal, it is not subject to the liens asserted by them; *second*, that complainants are not entitled to payment in full for the amount of their claims. A discussion of the questions raised by these claims will review every question presented by the record.

1. Was the property a homestead? When the complainants' liens attached, the property was unoccupied. If, therefore, defendant resided on other property owned by her, she could not claim a homestead in the property in question. *McMonegal* v. *Wilson*, 103 Mich., at page 268 (61 N. W. 495). Defendant testified that, when the house was built, she lived on Lansing avenue, Detroit, part of the time, and boarded part of the time; that she did not own the house in which she lived, and at that time owned no other property in Detroit than that involved in this suit. Complainants put in evidence a deed executed July 18, 1901 (this was after complainants' liens had attached), from defendant Keohane to Thomas Gaffney and wife, conveying lot 31 of P. Williams' subdivision of private claim 31, fronting on Lansing avenue. When this testimony was introduced, complainants' counsel stated:

"The testimony shows she was living on Lansing avenue, and that she did not own the house. I will produce further proof of that."

No further proof was produced either by complainants or by defendant.

The trial judge, in his decision, stated:

"I find, also, * * * that this was not the homestead of the defendant at the time the liens were filed. Indeed, she had another and separate homestead."

It must be admitted that the evidence respecting the homestead was left in an unsatisfactory state. It is difficult to understand why complainants' counsel did not

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carry out his proposed plan, which was, as we understand, to prove that defendant resided on the land subsequently conveyed to Gaffney. On the other hand, it is even more difficult to understand why, if this land was not that on which defendant lived, she did not, as she surely could, prove that fact. If this condition of the record did not furnish affirmative testimony that defendant resided on the land subsequently sold to Gaffney, it certainly did justify the trial judge in discrediting, as he did, defendant Keohane's testimony that she did not own the house in which she lived. This decision we will not disturb.

2. Are complainants entitled to payment in full? Defendant James Scheel was the principal contractor. The contract price was $1,100. About June 1, 1901, and after $550 had been paid him, Scheel abandoned his contract, leaving the building incomplete. Of the amount so paid, Scheel had paid out to laborers and materialmen $405.02, though this had not been distributed as required by the principles announced in *Fairbairn* v. *Moody*, 116 Mich. 65 (75 N. W. 469), and *Smalley* v. *Gearing*, 121 Mich. 190 (79 N. W. 1114, 80 N. W. 797). At that time he owed the first-named complainant $312.50, the amount of its claim asserted in this case, for material used in the building. He also owed the other complainants, Messrs. Hugg & Oltz, but just how much it is impossible, by this record, to state; and the building at that time was very far from completion. After this abandonment, defendant Keohane proceeded and completed the building at an additional expenditure of $1,016.35. The complainants insist that the rule for determining the amount of claims announced in *Fairbairn* v. *Moody*, 116 Mich. 65 (75 N. W. 469), and *Smalley* v. *Gearing*, 121 Mich. 190 (79 N. W. 1114, 80 N. W. 797), should not be applied, for two reasons: *First*, the contract between Keohane and Scheel was so vague and indefinite that it must be disregarded; *second*, defendant Keohane, in completing her house, made a different house from that contemplated by the original contract, and thereby waived all rights under said contract.

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There is no merit in the first contention. While the contract is informal, its meaning is made sufficiently clear by the accompanying plans and specifications.

In completing the house after the abandonment by defendant Scheel, defendant Keohane did make some changes in the original contract, which obtained for her a house, as she stated, "a little better" than was originally contemplated. These changes, however, were simply such changes as an owner, in good faith, not infrequently makes during the process of construction. For instance, a window was extended out; grills were put in; inside woodwork was filled and oiled, when the specifications called for three coats of paint; bevel plate glass was put in the front door, when the specifications required No. 1 glass. Surely, these changes do not justify a disregard of the principles of the case of *Smalley* v. *Gearing*.

The condition of this record, however, is not such as to enable this court to finally dispose of this controversy. It has already been stated in this opinion that it is impossible to determine from this record what amount was due Messrs. Hugg & Oltz at the time defendant Scheel abandoned the contract. It is shown by the testimony in this case that, after that abandonment, Messrs. Hugg & Oltz did some work under an agreement with defendant Keohane that she should pay for the same; that the total amount due for work done under said agreement with defendant Keohane, and the balance remaining due under their contract with defendant Scheel, aggregated $92.50. But how much of this $92.50 consisted of the balance due under their contract with defendant Scheel, or how much arose from work done under the agreement with defendant Keohane, the record does not disclose. It is obvious that the amount due Messrs. Hugg & Oltz for work done directly under a contract with defendant Keohane should not be reduced, under the principles of *Smalley* v. *Gearing*, *supra*. It is equally obvious that the amount due them for work done under their contract with defendant Scheel must, in accordance with those princi-

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ples, be reduced. This is true, notwithstanding other testimony in the record that defendant Keohane promised to pay this balance, as this promise certainly would not establish a lien against her property which otherwise did not exist. The record furnishes no *data* by which the court can determine the cost of completing the building in accordance with the original contract. It is true, we are informed that it cost $1,016.35 to finish the building, but this amount was expended for building according to the method adopted; in other words, there is included in these figures a sum, which we cannot determine, for some extras and departures from the original contract.

Complainants Hugg & Oltz are entitled to a decree for the full amount of their claim for work done after the abandonment by defendant Scheel. The balance of their claim, and the claim of the complainant the Delray Lumber Company, must be reduced according to the principles announced in the case of *Smalley* v. *Gearing*, *supra;* that is to say, they will have such a proportion of the amount of their claim as $1,100 is of the cost of constructing the house in accordance with the original contract. The record shows every element of this entire cost, except one, viz., the amount expended by defendant Keohane in constructing the house according to the original contract. This amount may be determined by subtracting from $1,016.35 (the amount it cost the defendant Keohane to complete the building in the way it was completed) the cost of changes and extras. The remainder, added to $405 (the aggregate of complainants' demands), and $405.02 (the amount expended by defendant Scheel), will represent the entire cost of constructing the house according to the original contract.

The decree will be reversed, and the record remanded to the court below, with directions to take proofs and to enter a decree in accordance with the principles herein stated. Defendant Keohane will recover the costs of this court. Complainants will recover costs in the lower court.

The other Justices concurred.

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PEOPLE v. TILLMAN.

ASSAULT AND BATTERY — SELF-DEFENSE — EVIDENCE — PREVIOUS ASSAULT.

A person charged with assault and battery, who claims to have acted in self-defense, may show that on the previous day the complaining witness made an assault upon him for the same cause, as tending to justify a belief that he was in the act of commencing another assault.

Error to Houghton; Streeter, J. Submitted November 20, 1902. (Docket No. 218.) Decided December 16, 1902.

Arthur A. Tillman was convicted of assault and battery. Reversed.

Respondent was convicted of assault and battery upon one Komoll. Komoll testified that he had pawned certain tools with the respondent, and secured thereon a loan of $2, for which he had agreed to pay 50 cents. Respondent testified that he had purchased them, and afterwards sold them back to Komoll. Komoll paid respondent $2.50, and received back the tools. Upon examining them he claimed that some were missing. He charged respondent with taking them, and threatened him with criminal prosecution. Komoll entered the store of respondent, charged him with taking some of the tools, and an affray between them ensued, each claiming that the other was the aggressor and struck the first blow. On the day previous, Komoll and respondent met upon the street, and Komoll then charged respondent with taking some of the tools. An altercation there ensued, in which each charged that the other was the aggressor. The details of the transaction between the two were fully detailed to the jury. The court instructed the jury that the altercation upon the street the day before could not be considered by them, except as it bore on the credibility of the witnesses, and added:

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"But it would have considerable bearing—might have a considerable bearing—if the case rested alone on the complaining witness and on the testimony of the defendant as to which one was likely to be the aggressor on the night of the 12th."

W. A. Burritt, for appellant.

Oscar J. Larson, Prosecuting Attorney, for the people.

GRANT, J. (*after stating the facts*). We think the court erred in this instruction. The affray took place in the respondent's store. He claimed that he acted in self-defense. The complaining witness admitted that he was under the influence of liquor when both altercations occurred. Previous assaults, the conduct and threats of the complaining witness, were competent for the jury to consider in determining the state of mind of the defendant and the character of his acts. The respondent was justified in acting in view of the surrounding circumstances as they appeared to him at the time. If the complaining witness had made a previous assault upon him for the same cause on the day before, and his attitude and conduct were such as to justify a belief that he was in the act of commencing another assault upon him, the law did not require him to wait until an actual assault had been made. *Galbraith v. Fleming*, 60 Mich. 403 (27 N. W. 581).

Conviction reversed, and new trial ordered.

The other Justices concurred.

PEOPLE *v.* WALBURN.

LARCENY—FELONIOUS INTENT—CONDITIONAL SALE.

Where the assignee of a contract authorizing the vendor to take possession of an organ in case it is not fully paid for takes possession of such organ under the belief that it has not

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been fully paid for, he is not guilty of the felonious intent necessary to constitute larceny, although the jury find that the purchase price had been paid.

Exceptions before judgment from Muskegon; Russell, J. Submitted November 21, 1902. (Docket No. 224.) Decided December 16, 1902.

James Walburn was convicted of larceny. Reversed and respondent discharged.

The respondent was convicted of the larceny of an organ. The statement of facts made by the respondent's attorneys is not disputed by the people, and will therefore be taken as correct. It is as follows: In 1898 one Moran, the complaining witness, made a contract with the Farrand-Votey Organ Company for the purchase of an organ through the company's agents, Samuel and Edward Spicer. Moran made several payments upon the organ, and claimed to have had an arrangement with the Spicers by which, when they stopped with him, he was to charge the cost of board and horse-keeping against them, to be applied towards the payment of the organ. This arrangement was denied by the Spicers. He claimed to have a charge against them for this of $11.80. No settlement of such account was ever made. After a part, if not all, of such board bill had accrued, and the original contract was past due, the Spicers and Moran met, agreed upon the amount due upon the old lease at $56.75, and made a new lease therefor. Moran made three cash payments thereafter. The Spicers before this time had paid the organ company in full, but the new lease was made in the name of the organ company. The organ company, at the request of the Spicers, assigned the lease to the respondent. The Spicers paid the organ company for this and other leases or contracts for sale, and borrowed the money from a bank. Afterwards, being in need of money to meet this obligation, they sold this contract or lease to the respondent, who paid them in cash therefor $17.42; being the balance due on the contract, aside from the disputed board bill.

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Respondent afterwards drove to Moran's house—17 miles—to secure payment. Moran was not at home, and at the request of Mrs. Moran he drove with her several miles farther to Montague, where she telephoned to Mr. Moran. Soon after Moran went to Fremont, where respondent lived, but did not call upon him, as he had agreed to. Respondent went a second time to see Mr. Moran, but did not find him, as he was absent from home. He started a third time, and met Mr. Moran on the road, and asked him to pay the balance due on the contract. Moran's testimony of the conversation at that time is as follows:

"He says, 'I was just going down to your place.' I says, 'Yes.' He says, 'What about that organ, Patsy?' 'Well,' I says, 'Jim, there is $4.10 due on that organ;' and I says, 'I have the money here to pay for it,'—put my hand in my pocket. He says, 'Patsy, that is no use to me. I have got to have $17. There is that due on the organ now.' I says, 'Jim, I paid $35, $15, $12, and $15, and $11.80 board bill that the Spicers owed me, and $8.90 interest,—leaves a balance due of $4.10.' 'Well,' he says, 'I don't think they will pay it,—the board bill.' He says, 'I have got to do my duty in regard to this matter. I have got to either have $17 or the organ.' Now, that was the weight of the conversation."

Respondent denies this conversation. The settlement and second lease or contract were ignored by Moran. In his testimony in chief he was not asked by the prosecuting attorney and made no reference to the second lease or agreement, but referred to all his payments as having been made upon the first one. After the several attempts to collect, respondent succeeded in bringing one of the Spicers and Moran together, and tried to have them effect a settlement. Moran then informed them that he had turned the matter over to an attorney, and had nothing to do with it. Subsequently respondent, taking a man with him, went to Moran's house, arriving there about noon, Moran was not at home. He informed Mrs. Moran and her daughter that he had come to take the organ. They

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protested, but made no resistance, and he used no violence or force. He told them that he was going to take the organ to Fremont, and that Mr. Moran could come there and settle the matter.

Smith, Nims, Hoyt & Erwin, for appellant.

Charles B. Cross, Prosecuting Attorney, and *George S. Lovelace*, Assistant Prosecuting Attorney, for the people.

GRANT, J. (*after stating the facts*). Several questions are raised upon the admission and exclusion of testimony, the remarks of the prosecuting attorney, and the charge of the court. In the view we take of the case, it is unnecessary to discuss them. We find nothing in the evidence to show that respondent was guilty of the felonious intent necessary to constitute the crime of larceny. If the organ was not fully paid for, respondent was entitled to take possession of it. The criminal intent was made to depend entirely upon the question of whether the jury should find that Moran had fully paid. The theory of the prosecution was that respondent bought this lease for the express purpose of helping the Spicers to escape the payment of this board bill. There is no testimony to establish such claim. Respondent paid the Spicers the full amount due upon the contract. They all so testified, and there is nothing on the record to dispute it. The Spicers wanted money to pay their note at the bank, and asked the respondent to assist them by buying this lease or agreement. There is nothing unnatural about the transaction, or about anything they did. There is nothing in it to show any disposition or wish to defraud anybody. If Moran had a valid agreement with the Spicers to pay for their board, he could have sued them and recovered judgment. It is significant that, when the second lease or contract was executed, nothing was said by Moran to the Spicers about this board bill, part or all of which had then accrued. They then had a settlement to determine the amount due. Evidently

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Moran attempted to avoid this settlement by ignoring it and the contract based thereon, and relying upon the first contract. There was a dispute between these parties, which is the proper subject of a civil suit, but not of a criminal one.

The conviction is reversed, and the prisoner discharged.

The other Justices concurred.

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GOPPELT *v.* BURGESS.

WITNESSES—UNDISPUTED TESTIMONY—DIRECTING VERDICT.

Where it cannot be said that a party's undisputed testimony is so clear, certain, and consistent that the jury are bound to accept it as conclusive proof, a verdict should not be directed in his favor by the court.

Error to Saginaw; Snow, J. Submitted November 21, 1902. (Docket No. 115.) Decided December 16, 1902.

Replevin by Martha Goppelt against William W. Burgess. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Reversed.

Eugene Wilber, for appellant.

James H. Davitt, for appellee.

CARPENTER, J. Plaintiff replevied a quantity of household goods which defendant, undersheriff of Saginaw county, had on February 27, 1901, seized under an execution against plaintiff's husband. A large part of these goods belonged to plaintiff's husband when he and plaintiff were married. Plaintiff claimed that her husband sold this property to her. The only witness who testified on this subject was the plaintiff herself. The court, in

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directing a verdict for the plaintiff, decided that the jury was bound to believe her testimony, and the only question before us is whether or not this decision is correct. The determination of this question requires an examination of plaintiff's testimony. She testifies that she was married June 24, 1896, and commenced housekeeping the next day in a house rented by her husband; that the furniture in question was then her husband's furniture, and in his house; that on November 8, 1897, she received from her father's estate a check for $500; that this check she indorsed and gave to her husband (and this check, bearing her and her husband's indorsement, was produced on the trial) upon the understanding that she was to have the entire household furniture; that she cannot repeat the conversation respecting this transaction. On cross-examination she was asked: "Was it talked over, you were buying the household furniture and giving him the check? Was that ever talked over?" To that plaintiff answered, "Why, I don't know as that was ever talked over." She also testified that no computation was made to determine the value of the furniture transferred. Asked whether she did not loan her husband the money, plaintiff replied, "No; I gave him the money. I gave it to him outright. I didn't loan it to him." Until early in February, 1901, the furniture was used in the house occupied by plaintiff and her husband. In that month they removed to Milwaukee, Wis., and plaintiff stored the furniture with her brother. Until February 18, 1901, the furniture was insured in the name of plaintiff's husband. Respecting this, plaintiff testified, "Mr. Goppelt took out the insurance. Whether in his name or my name I do not know."

We think it was the province of the jury to decide whether or not this testimony was to be believed. While the transfer of household goods, claimed by plaintiff to have been made, is legal (*Davis* v. *Zimmerman*, 40 Mich. 24), it was nevertheless an unusual and peculiar transaction. There was no change in the possession or use of the property. The transfer was accompanied by no circum-

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stance which would furnish certain proof or secure publicity, and was known only to the immediate parties, and capable of being proved only by the impressions retained in their memory. It cannot be said of plaintiff's testimony that it came from a disinterested witness; nor can it be said that it was so clear, certain, and consistent that the jury was bound to accept it as conclusive proof of the transfer under consideration. We think this conclusion is justified by the cases of *Druse* v. *Wheeler*, 26 Mich. 189, and *Michigan Pipe Co.* v. *Marine Ins. Co.*, 92 Mich. 482 (52 N. W. 1070, 20 L. R. A. 277).

The judgment of the court below is reversed, and a new trial ordered.

The other Justices concurred.

McCORMICK *v.* OLBINSKI.

1. APPEAL—EVIDENCE—OBJECTIONS.
   Rulings on the admission of testimony will not be reviewed in the absence of objections or exceptions, or on other objections than made in the court below.

2. SAME—HARMLESS ERROR.
   The admission of immaterial testimony that could not have affected the result is not reversible error.

Error to Kent; Wolcott, J. Submitted December 3, 1902. (Docket No. 187.) Decided December 16, 1902.

Assumpsit by Henry F. McCormick and Simon La Grou, copartners as McCormick & La Grou, against Antonia Olbinski, for services rendered. From a judgment for plaintiffs, defendant brings error. Affirmed.

Roger Olbinski (*E. J. Adams*, of counsel), for appellant.

Grove & McDonald, for appellees.

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GRANT, J. This suit originated in justice's court, where plaintiffs had judgment. The amount involved is $110, of which $100 is for the services of plaintiffs as attorneys in defending Frank Olbinski, a son of the defendant, who was charged with larceny of property exceeding in value $25, and is the only item in controversy. Her son was acquitted. Plaintiffs attended to the examination before the justice and the trial in the superior court. The defendant denied that she employed them. This was the chief issue. The reasonableness of the charge cannot be seriously disputed. Verdict and judgment were rendered for the plaintiffs.

Fifty-three assignments of error are made and insisted upon. Forty-six of them relate to the rulings of the court upon the testimony during the progress of the trial. To some of these no objection was made; to others no objection was taken; in others the objections now made were not made in the court below. In some cases the testimony admitted may have been immaterial, and could have been properly excluded, but it could not have prejudiced the defendant or affected the result. The charge of the court stated the questions at issue, and covered the principles of law necessary for the instruction and direction of the jury.

We find no prejudicial error, and the judgment is affirmed.

The other Justices concurred.

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CRIPPEN v. ADAMS.

MISTAKE—GIFT INTER VIVOS.

When a person 85 years old, desiring to give a domestic in his household $500, on the day of his death, in order to carry out his wish, indorsed in lead pencil four certificates of bank stock, of the aggregate value of $4,500, it was *held* that the

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transfer was a mistake, and should be set aside, except that the servant should be allowed to retain $500 in par value of the stock, conceded to her by the executor and heirs of the deceased.

Appeal from Wayne; Donovan, J. Submitted December 4, 1902. (Docket No. 72.) Decided December 16, 1902.

Bill by William H. Crippen, executor of the last will and testament of Abram Shear, deceased, against Rachael Adams and others, to set aside a transfer of bank stock. From a decree for complainant, defendant Adams appeals. Affirmed.

Alfred Lucking (*W. M. Lillibridge*, of counsel), for complainant.

Moore & Moore, for appellant.

MONTGOMERY, J. Abram Shear died February 7, 1901, at the advanced age of 85 years. The immediate cause of his death was bronchial pneumonia. He was stricken with this disease on February 4th, and the disease apparently progressed steadily until the 7th, when, at about 4 o'clock in the afternoon, he died. On Wednesday, the 6th, he was possessed of his faculties, and at that time expressed the desire to his niece, Mrs. Moon, that the defendant Mrs. Adams should receive $500 out of his estate. Mrs. Adams had been a domestic in the decedent's household for some years at a salary of $1.50 per week, and decedent evidently desired to reward her faithfulness. On the morning of the 7th, Mrs. Moon undertook, at the suggestion of defendant's son-in-law, to provide a means for decedent to complete his gift. Mr. Bennett, the cashier of the Plymouth Savings Bank, was sent for, and produced four certificates of stock in the bank, standing in the name of Mr. Shear, representing an aggregate value of $4,500, which were indorsed by him in pencil. This bill is filed to set aside this transfer on the ground

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that the decedent never intelligently and understandingly made such disposition of the stock. On the trial below, complainant and the heirs expressed entire willingness to carry out the expressed desire of decedent, and allow her to retain $500 in par value of this stock. The court so decreed, but found for complainant in general, and set aside the transfer as to the balance. Defendant appeals.

We are satisfied with the holding of the circuit judge. The testimony leaves no doubt in our minds of the merit of the case made by the bill. While no fraud was intended, it is apparent that some one blundered, and that, in an attempt to make a provision of $500 bounty to the defendant in accordance with the wishes of Mr. Shear, there was an apparent nominal transfer of $4,500, which was accomplished, so far as it was accomplished, without the intelligent assent of Mr. Shear.

The decree is affirmed, with costs to complainant.

The other Justices concurred.

POWERS v. PERKINS.

1. WATER RIGHTS—SALE—CONSTRUCTION.

Complainant built a water-power canal, the power of which was placed at 66 run of stone, or 990 horse power, known as "first-class power;" all over that being known as "second-class power." Defendant purchased one run of first-class power and two runs of second-class power. The latter could only be used when the canal developed more than 66 run of stone. No run of first-class power took any priority over other runs of the same class, but defendant's two runs of second-class power took priority over other runs of that class of power. *Held*, that the fact that the canal had a capacity of 1,000 horse power, instead of 990, did not entitle defendant to the use of one and two-thirds first-class runs and one and one-third second-class runs.

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2. SAME—AMOUNT OF POWER.
A decree that there could not be any second-class power until over 68,000 cubic feet of water was flowing into such canal per minute was a proper interpretation of the rights conferred by the owner of such water power.

3. SAME—EXCESSIVE USE—LIABILITY.
Where a person purchases a certain amount of water power from the owner of an artificial waterway, constructed for the purpose of furnishing power, he is not entitled to a greater amount than he purchased, although there is water going to waste; and, if he uses more than he purchased, he must pay for it.

4. SAME—DAMAGES—FINDING OF COURT.
In this case the proof on the question of damages was very conflicting, and the finding of the lower court, who heard the evidence, was not disturbed.

Cross-appeals from superior court of Grand Rapids; Newnham, J. Submitted October 10, 1902. (Docket No. 38.) Decided December 29, 1902.

Bill by William T. Powers against Willis J. Perkins to restrain the excessive use of water for power, and for an accounting. From the decree rendered, both parties appeal. Affirmed.

Kingsley & Wicks, for complainant.

Loyal E. Knappen and *Stuart E. Knappen*, for defendant.

MOORE, J. The questions involved in this litigation are stated by the judge of the superior court in a written opinion filed by him as follows:

"The complainant, William T. Powers, files his bill against the defendant, claiming damages on account of the excessive use of water on the part of the said defendant, and asking an injunction against the said defendant from using a certain wheel known as a 'Risdon Wheel,' and from using more than his just proportion of water. I find the facts in this case to be as follows: That William T. Powers, the complainant, built what is known as the

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'West Side Canal;' that the power developed by said canal was placed at 66 run of stone, which was to be known as 'first-class power,' and that all above 66 run of stone, or 990 horse power, was to be known as 'second-class power;' that the said complainant deeded to one Harrison one run of first-class power and two runs of second-class power; that of the said first-class power none of the runs of stone took priority over the other, but that of the second-class power there was a priority, and that, when there was more water in the canal than was necessary to run the 66 run of stone of the first-class power, then the two run of stone which was sold by the said complainant to the said Harrison took priority over any other second-class run. The power which was purchased by Harrison was afterwards acquired by the defendant in this case.

"I find, under the evidence in the case, that during three months of the year there was a full head of water, in which not only all the first-class power could be used, but that the second-class power belonging to the defendant could also be used, but that during the balance of the year there was not enough to run any of the second-class power; that there was about four months of the year in which the run of stone of the first class belonging to the defendant could be used to its full capacity, but that for the balance of the year, and for a period of six months of the year, there was only what was known as a '50 per cent. canal.' The defendant placed in his factory, in order to run his machinery, what is known as a 'Risdon Wheel,' six feet in diameter, which required more than one run of stone to operate the same, and that in operating the same the said defendant did use more of the water than he was entitled to; that the said Risdon wheel was put in against the objection of the complainant, and against his protest; that the said Risdon wheel occasioned a waste of water on the part of the defendant. I find, also, as a matter of law, that the defendant was only entitled, when the water was below that stage which was required to develop 66 run of stone, to $\frac{1}{2}$ of the power, but that he used more than his just proportion. It is a difficult matter to estimate the damages correctly in this case which should be awarded to the complainant, but I am of the opinion that the sum of $3,000 would not exceed the amount which the defendant should pay for the extra water which he has consumed. I find also that the complainant is entitled to a perpetual injunction restraining the said defendant from using more

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than his just proportion, or from using any wheel which will require a greater amount of water to run it than he is entitled to."

A decree was entered in accordance with the opinion. It is the claim of complainant that, under the proofs, he should have been awarded upwards of $9,000. The defendant claims that, if he used any water in excess of what he had a right to use,—which he does not admit,—the damages were nominal, not more than $466.66. He also claims the decree is wrong as to what constitutes low water. Both parties appeal.

In the case of *Powers* v. *Hibbard*, 114 Mich. 533 (72 N. W. 339), many of the questions involved in this case arose. A copy of the deed given to persons entitled to use water is set out in that case. A reference to it will make it unnecessary to make so long a statement here as would otherwise be necessary.

Mr. Perkins is the owner of one run of first-class power and two runs of second-class power. Instead of putting in two wheels, one of which might be used when he was entitled to use only first-class power, he put in only one wheel, which, according to a table introduced by him in evidence, developed 49 horse power at ordinary head. The use of this wheel is shown by the cross-examination of Mr. Perkins as follows:

"*Q.* Now, what did Mr. Powers or Mr. Spooner say their objections were to the Risdon wheel, aside from combining the first and second class runs upon it? In other words, didn't they say, when you only used one run of the first class, that wheel would not use it economically?

"*A.* That was the substance of their answers.

"*Q.* Now, you say that, prior to the decision in the *Voigt Case* by the Supreme Court, you believed that you had a right to use 45 horse power on the Risdon wheel at ordinary stages?

"*A.* Yes, sir.

"*Q.* Combining the first and second class together at ordinary stages?

"*A.* Yes, sir.

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"*Q.* And that you also had the right absolutely to 15 horse power of the first class at all stages of the water?

"*A.* When I could secure it.

"*Q.* So that was the theory on which you had been operating the shop from the time you started it up until the decision in the *Voigt Case?*

"*A.* In the Supreme Court?

"*Q.* In the Supreme Court, I mean.

"*A.* Yes, sir.

"*Q.* Forty-five horse power at ordinary stages and 15 horse power on the first-class run whenever you could secure it?

"*A.* Yes, sir.

"*Q.* Without regard to the stage of water in the canal?

"*A.* Practically.

"*Q.* Well, then, under that theory the practice necessarily must have been that, as long as there was power in the canal, you ran this Risdon wheel with the gates wide open, in low stages?

"*A.* Yes, sir; in low stages.

"*Q.* And ordinary stages,—that is, down to a five-foot head?

"*A.* Oh, we would not need it. We ran the wheel many months without it being wide open.

"*Q.* That would be when there was a higher head?

"*A.* Yes, sir; we didn't need it.

"*Q.* Did you ever have occasion to observe at what particular head the Risdon wheel could be run with the gates wide open, and furnished power to operate your shop and keep it up to motion?

"*A.* I could not answer that, sir.

"*Q.* Assuming that that was a five-foot head, then you would run the Risdon wheel from that head of five feet down through four and a half, four, and three, or whatever it might be, with the gates wide open?

"*A.* The gates open wide enough to get power to run the shop; not necessarily wide open.

"*Q.* They must necessarily be wide open, if you pay heed and discriminate on the question, when I say a five-foot head will just furnish the power with the gates wide open, every one of them.

"*A.* If we assume that?

"*Q.* Yes, sir; that is the question. You say you don't know what head. Now, I am assuming a five-foot head. That was the question.

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"*A.* Yes, sir.

"*Q.* Haven't you been in the shop, and given instructions, when it was not running to motion, to see if you could not open the gate of the wheel wider?

"*A.* Yes, sir.

"*Q.* And tried the hand wheel?

"*A.* I cannot say that I ever tried the hand wheel myself.

"*Q.* Ordered others to try it?

"*A.* Probably have.

"*Q.* In order to get power enough to run the shop to motion?

"*A.* That is, when there was a low head.

"*Q.* Under a low head?

"*A.* Yes, sir.

"*Q.* Now, since the Voigt decision in the Supreme Court you have changed the rule, or rather the practice, of drawing water from the canal?

"*A.* Yes, sir.

"*Q.* Now, just what change have you made, since the decision in the Supreme Court, in the practice and rules and instructions; in other words, what were your instructions?

"*A.* My instruction was to run the large wheel when the water was running over the crest of the dam.

"*Q.* And when it was not running over?

"*A.* Then we would put on our steam power.

"*Q.* When did you put in the American?

"*A.* I could answer that question by looking up the dates, but I couldn't give it to you offhand, sir.

"*Q.* Did you use the Risdon wheel before the American was put in, and after the decision of the Supreme Court in the *Voigt Case*, when the water was below the crest?

"*A.* We didn't make a practice. It may have been used some. I couldn't answer you that positively. It may have been used some when I was out of the city. I am out of the city a month and two months at a time.

"*Q.* Did you ever make any inquiries of your engineer, or those that were operating your shop, what head your drawing station required to run the shop to full motion on the Risdon wheel alone?

"*A.* Not that I am aware of.

"*Q.* Why didn't you make some inquiries, or at least know the use of the water at that drawing station?

"*A.* Well, if we had the water, we used it, and, if we

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didn't, we couldn't. That was all there was about it.

"*Q.* You didn't care about the details?

"*A.* I didn't go into the details of the head because, as I said before, I assumed we had the right to use the power.

"*Q.* You would use it whether you had a five-foot head or a three-foot head?

"*A.* I wasn't aware that the people below me were taking any cognizance of the head.

"*Q.* Were you paying any attention to your *pro rata* share of the water in relation to other owners and users along the canal?

"*A.* I would have to look at the deed to see whether that term occurs in there before I would answer that.

"*Q.* You know as a matter of fact during these years whether you paid any heed to the other owners or users?

"*A.* No.

"*Q.* Without regard to the language of the deed?

"*A.* I said I didn't.

"*Q.* That is, you mean you didn't pay any heed to them?

"*A.* No, I did not.

"*Mr. Knappen:* I don't know as I understand the witness now,—the answer 'I didn't,'—whether he didn't pay any attention or whether he didn't know.

"*Mr. Kingsley:* He said he didn't, as a matter of fact.

"*Q. By the Court:* Is that what you mean?

"*A.* That is what I mean. I simply had the right to use it.

"*Q.* Since the Voigt decision you have used water from that canal when it was below the crest of the dam, have you not?

"*A.* Certainly, and we are entitled to it.

"*Q.* You always did that, didn't you?

"*A.* Sir?

"*Q.* You have always been entitled to use water from the canal when it was below the crest?

"*A.* We haven't had a small wheel in until recently. We use it with a small wheel below the crest of the dam.

"*Q.* Did you ever have occasion to inquire how many cubic feet the Risdon draws at five feet, four feet, or three feet?

"*A.* Do you mean head?

"*Q.* Yes, sir; I mean head.

"*A.* I never took the opportunity of inquiring.

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"*Q.* When these various notices were sent to you that have been spoken of and been introduced in evidence as to the use of the water and the *pro rata* share of each, did you pay any heed to those?

"*A.* Those notices were generally received three or four days after the measurement was taken, and in many instances we had a full head when the notices were received, and the water was not at the stage described in the notice.

"*Q.* In other words, you mean you knew more about the state of the head and the condition of it at your drawing station than the notice gave you?

"*A.* I certainly do if there is a rainstorm in the meantime, and if I receive that notice three days after it was taken.

"*Q.* I think that is correct.

"*A.* Sure.

"*Q.* Then you had no use for the notices anyhow?

"*A.* I don't say that.

"*Q.* Well, I will ask you that question, were they of any use to you?

"*A.* Why, yes, sir; in a certain respect. We tried to respect them to a certain extent, and did, after we received the notice of the Supreme Court, in regard to the decision.

"*Q.* I am speaking about Mr. Powers' private notices, before the Supreme Court notified you. Did you pay any attention to those?

"*A.* Not any material attention, because, as I stated, I supposed we had the right.

"*Q.* And you state further that those notices came to your hands after you had used the water on those particular days which the notices came?

"*A.* Most certainly. They were mailed and figured up and sent to me.

"*Q.* And you knew the state of the water better than the notices gave it to you?

"*A.* I knew the state at that time better than the notice which referred to several days before."

It is impossible to read the testimony of Mr. Perkins without reaching the conclusion that for years he has been in the habit of using water in excess of what he is entitled to use. It is the claim of defendant that the canal had a capacity of 1,000 horse power, instead of 990, and that, when the 66 run of stone were satisfied, there was still an

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excess of 10 horse power, when the water was at the average stage, which he was entitled to use. This is but another way of saying that, though he bought but one first-class run and two second-class runs, he is in fact entitled to one and two-thirds first-class run and one and one-third second-class run. In *Powers* v. *Hibbard*, *supra*, it is said:

"But counsel for defendants insist that these attendant circumstances cannot be taken into consideration, as parol evidence cannot be received to modify, vary, or change the terms of the deed. * * * It appears that this canal is nearly two-thirds of a mile in length. The surface of the water in it is much higher than the water in the rapids. The distance between the surface of the canal water and the surface of the water in the rapids increases rapidly from the dam to the lower end of the canal; and the plan or scheme laid out by Mr. Powers originally seems to have been that 66 runs of stones should be distributed along the whole length of the canal, from the dam to the lower terminus. There was sufficient power for driving this 66 runs of stones. This fact was determined by ascertaining the horse power in the canal at the ordinary stages of the water. It was found that, in ordinary stages of water, the canal could deliver for use at the several drawing stations sufficient water to operate 66 runs of millstones, or 990 horse power, but not so much in low water, though much more than that at times when there was an extra supply in the river; that, in order to ascertain the total water power of the canal, it was necessary to find the quantity of water needed by each of the 66 runs of stones located at the different drawing stations along the whole length of the canal, according to the fall at the respective mill sites where the water was withdrawn from the canal, as it was apparent that a run of stones operated at the foot of the canal would require much less water than one operated nearer the dam, as the quantity of water to operate a run of stones depended upon its location along the course of the canal, for the head or fall at a particular place must be determined first, in order to fix the quantity of water required to operate a run at that place. The scheme or plan was set forth in the general form of the deeds and leases used in making sales or letting privileges, so that each purchaser of power was informed, by the terms of his

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granting document, just what were his rights, and also what were the rights of his neighbors, as well as the reserved rights of the original proprietor. By these grants, every run was to be used at some fixed point or site; and, when so located, the head or fall was known at once, and the quantity of water required to meet the grant could be readily ascertained."

We do not think the claim of defendant was contemplated by the owner of the power or the original purchaser of it, or is sustained by the proofs.

Complaint is made of the following portion of the decree:

"It is further decreed, according to the plan of said canal there was not and cannot be any second-class power until after the water in the pond is flowing freely over the crest of the dam, when that structure is in ordinary repair, or over 68,000 cubic feet of water is flowing into the canal per minute, which amount of water is required to constitute a canal which will develop 66 runs of millstones of the first-class."

Without going into the matter in detail, we think this a proper interpretation of the rights conferred by the owner of the power.

Counsel say:

"When the canal furnishes as low as 5 ft. 6 in. head at Mr. Perkins' drawing station (being a 90 per cent. canal), all the runs of Mr. Powers located and equipped with wheels, or ever prepared for use, whether assessed for expenses of maintaining the canal or not, could be operated to their full capacity. We make no claim that, when the water is below a stage at which the lawful demands of all located power can be supplied, the defendant could be permitted, by overuse of his right, to curtail the full enjoyment of Mr. Powers of his located rights; but we do contend that, so long as that point is not reached, Mr. Perkins has the right to all his power of both classes to the extent the canal will supply it. As, under such circumstances, no one is in the slightest degree trespassed upon, this construction does no violence to the terms of the contract defining the respective rights of the parties to this controversy. The proposition of counsel that the right to the water of a river flowing in a natural channel, and the right

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to the water flowing in an artificial channel, such as a canal, do not rest upon the same principles, and that in the case of a canal the right to draw from it rests exclusively upon the grant, and is limited by it, has no application to the facts of this case. The only prohibition in the grant itself against the use of second-class runs is that they 'shall not be used when, by reason of low water, their use will prevent the fair and ordinary use of any of the first class, and the rights of the owners thereof.' Manifestly, no owner of first-class power could complain of a use by other owners which did not affect the 'fair and ordinary use' by such holder. It would palpably be unfair, and against both the spirit and the letter of the 'grant,' to deny Mr. Perkinks the right to use his second-class runs, when otherwise the water would go to waste."

We cannot agree with this contention. If it is true, Mr. Perkins, by buying one run, could use several, and Mr. Powers would have no right to complain, simply because he had not found purchasers for the other runs. This is an artificial waterway, constructed for the purpose of furnishing power, some of which was to be sold. A purchaser of power was entitled to what he bought, and no more. If his needs require more power than he has purchased, he should buy more; and, if he does not do so, but uses power in excess of what he has purchased, he must pay for it.

This brings us to the question of damages. Complainant submits the following table of damages:

Months.	Excess in H. P.	Value.
3 Mos.	None.	$000 00
1 Mo.	22 h. p.	114 40
2 Mos.	56 h. p.	291 20
6 Mos.	44 h. p.	686 40
One year.	122 h. p.	$1,092 00

Total, 8½ years, at $1,092 per year, is $9,100.

Counsel for defendant question these figures in nearly every particular, and submit a computation which shows the damages amount to but $466.66. Proof is offered in respect to these respective claims. We have already

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decided what constitutes low-water mark, and disposed of the claim that the canal carried 1,000 horse power. It is impossible to figure out with any degree of accuracy the damages to which complainant is entitled. There is great conflict in the testimony. We are very clear that complainant should recover much more damages than defendant says he is entitled to. The judge who heard all the testimony gave complainant substantially all to which he was entitled.

The decree is affirmed, without costs in this court to either party.

HOOKER, C. J., GRANT and MONTGOMERY, JJ., concurred.

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F. W. KAVANAUGH MANUFACTURING CO. *v.* ROSEN.

1. SALE OF GOODS—CREDIT—FINANCIAL REPORTS.
A purchaser of goods, who has secured a term of credit, cannot be made to anticipate the payments because the seller has obtained a commercial agency report of the purchaser which is not satisfactory.

2. SAME—BREACH OF CONTRACT.
A manufacturer who, after accepting an order for goods and shipping a portion of them, obtains a commercial agency report of the purchaser which is unsatisfactory, and refuses to fulfill his contract, is liable to the purchaser for damages.

3. SAME—DAMAGES.
The measure of damages for failure to deliver goods sold, where they can be obtained in the open market, is the additional cost of the goods; where they cannot be obtained in the market, the purchaser is entitled to recover the profits lost through the fault of the seller.

Error to Wayne; Donovan, J. Submitted October 15, 1902. (Docket No. 65.) Decided December 29, 1902.

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Assumpsit by the F. W. Kavanaugh Manufacturing Company against Aaron D. Rosen, Louis Rosen, and Myer S. Fink, copartners as A. D. Rosen & Company, for goods sold and delivered. From a judgment for plaintiff, defendants bring error. Reversed.

Anderson & Rackham, for appellants.

Ira A. Lieghley, for appellee.

MONTGOMERY, J. On the 8th of February, 1899, the plaintiff's agent called upon defendants, A. D. Rosen & Co., at Detroit, and defendants gave an order to plaintiff for 600 dozen of Gem underwear, assorted sizes, for the price of 75 cents per dozen for size 16, with a rise of 25 cents per dozen for each larger size, and a trade discount of 15 per cent.; same to be shipped June 1st on the following terms: Net 10, October 31st. This order was forwarded to the plaintiff and entered upon its books at the home factory, in Cohoes, N. Y. Two shipments were made, aggregating 174 dozen, and this action is brought to recover the purchase price of these goods shipped. The case originated in justice's court, and the defendants gave notice of recoupment, and claimed damages for a breach of contract on the part of plaintiff, for failure to deliver the balance of the goods. On the trial at the circuit, plaintiff recovered the full value of the merchandise shipped, and defendants were defeated of any recoupment.

It will be noted that, upon the face of the contract, it appeared that payment was not due until 10 days after October 31st, or November 10th. On the 11th of September, plaintiff wrote defendants:

"If you will send us your check for goods delivered to you on your order, it will assist us greatly, as we are in need of cash, and goods are sold very close, so that we cannot afford to carry accounts to maturity. In fact, we sell all our goods with the understanding that bills will be anticipated by our customers. If you will help us out, we will try and send your goods promptly."

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To this defendants replied as follows:

"We are in receipt of your favor of 9/11/1899, and was quite surprised to note contents. We suppose you are aware that our order calls for 600 doz. Gem vests, p., and dr. Up to date you have only shipped us about 184 doz. There is still coming to us 416 doz., which should have been shipped nearly three months ago. We will make you a proposition, since you want the money badly. Ship us 300 doz. more Gems, and we agree the same day we check the goods off to send you our check in full up to date, less anticipation."

It appears that no immediate response was made to this letter, but on the 9th of October defendants again wrote plaintiff, notifying it that, unless supplied with the underwear, they would be compelled to go into the open market and buy them, and charge plaintiff with the difference. Plaintiff replied, saying that it had some time before asked for a check in settlement for goods already delivered, and added that:

"Our request was made on account of reports we received from a commercial agency to which we are subscribers, said reports being far from favorable to you or satisfactory to us; and we know of no law that will compel delivery of goods to customers whose financial standing is not satisfactory to the seller. Your refusal to pay for the goods already delivered certainly did not justify us in shipping you more goods, and rather indorsed the report which we had received. When our account matures, we certainly will use all means in our power to collect the same in full, as called for in our invoices."

To this defendants replied, expressing their surprise at the attitude taken by the plaintiff, and offering, if it would ship 300 dozen, to send check on the receipt of the goods. To this plaintiff replied that it would send goods on receipt of check for goods already shipped. To this defendants replied, in substance, that the bill was not yet due, but offering to receive the remaining 416 dozen underwear for spot cash, and authorizing shipment with draft attached to the bill of lading. This appears to have closed the correspondence.

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On the trial the court charged the jury as follows:

"I charge you, as a matter of law, that if you find, as a matter of fact, that the plaintiff received a report from the commercial agency, which report gave defendants a rating that was not satisfactory— Now, the test is not whether it was actually true or not. The test is not whether they were actually poor or not. The test is, did the seller in good faith honestly believe that they were in danger? and, if they believed it, they had a right to act upon it. That is the test. To reread a little,—that was not satisfactory to the plaintiff, and that plaintiff notified defendants of the fact, and offered to send the remainder of the goods if the defendant would pay for those already shipped, and the plaintiff relied upon the report, I will say in good faith, and the defendants refused then to pay for the goods already delivered to the defendants, and that the bills were to be anticipated, then and in that case you will allow no damages for the nondelivery, but would render a verdict for the plaintiff for the value of the goods delivered under the contract, with the interest thereon. * * *

"Now, you will not need to rely entirely on one person, for there are quite a number here. You will not need to say Rosen & Co. are actually insolvent. Some firms are entirely solvent, and slow-like. If the report was a true report, like in regard to their ability to pay, that is not the question for you to determine. We are not to pass upon their solvency. It is what they believed,—just like a man in self-defense strikes over a man, even in no danger. We are not to judge of it; it is what he believed to be the danger. And if they were in danger, even if they had sent the goods on,—even if they lay here in the station house,—if they were in danger they could order them back; they could stop them by telegram and say, 'Bring them back to us,' because the law protects a man if he is in danger; you can bring back your goods."

In the first part of this charge, it appears, the circuit judge made the defendants' right to recoup to depend on whether the plaintiff had acted in good faith upon the report made to it by the commercial agency, and whether there had been an effort made to anticipate the payments for which the contract provides. There was no evidence

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of such an agreement to anticipate payments. The correspondence clearly shows that a term of credit was extended to the defendants by the terms of the order itself, and the defendants were in no way in default for refusing to pay until the termination of that term.

The other proposition embodied in this charge is still more startling. The rule of law amounts to this: That if A. and B. make a contract, and B. afterwards meets C. upon the street, and C. says to B., "A. intends to beat you in that contract," this would excuse B. from performance. We have made some investigation, and have found no authority to sustain such proposition. It was open to the plaintiff to investigate the financial condition of defendants before making the contract. Failing to do this, nothing short of a breach of contract upon defendants' part, or actual insolvency, would excuse the plaintiff from fulfilling the contract on its part. Any other rule would leave a purchaser at the mercy of the seller, and could not afford a safe rule for the transaction of business.

As to the question of damages, there was testimony tending to show an advance in price of the identical goods in question by the plaintiff itself. There was also testimony tending to show that, when this contract was finally broken, defendants were unable to procure the goods in the open market; that they had contracted a large quantity of these goods at an advance of something over $1 per dozen, and were unable to fulfill their contract. The rule of damages in case they were able to procure the goods in the open market would be the additional cost to them; but, if the goods were not obtainable, defendants would be entitled to recover the profits lost through the fault of plaintiff. *Den Bleyker* v. *Gaston*, 97 Mich. 354 (56 N. W. 763).

The judgment will be reversed, and a new trial ordered.

HOOKER, C. J., MOORE and GRANT, JJ., concurred.

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LINCOLN v. FELT.

1. EVIDENCE—WITNESSES—CREDIBILITY—DEEDS.
   Proponent, who asked to have a lost instrument, in the form of a deed, probated as a will, testified on a former trial that, after the death of the grantor, he saw the deed, and read the names of the witnesses and notary, who were strangers to him, and that he did not remember the names. On the second trial the evidence showed that he was acquainted with the notary and the witnesses before whom the deed was executed. *Held*, that a request to charge that the deed seen by proponent could not be the one executed before the witnesses and notary was properly refused.

2. SAME—QUESTION FOR JURY.
   Inconsistency between the testimony of a proponent and his testimony on a former trial affects his credibility only, and is a question for the jury.

3. TRIAL—REQUESTS TO CHARGE—ERROR.
   It is not error to refuse a request to charge where the substance of the request is given.

4. WILLS—TESTAMENTARY DEED—EVIDENCE—NEW TRIAL.
   A motion for a new trial on the ground that there was no evidence of the execution of an instrument of testamentary character was properly denied, where there was testimony of the execution of a deed containing a description of certain land, and a statement that it should go to proponent after the grantor's death, and also proof that the grantor said she had given the property to proponent, "to take place after her death."

5. DEEDS—WILLS.
   A deed which in form is to take effect after the death of the grantor may be admitted to probate as a will.

Error to Wayne; Donovan, J. Submitted October 17, 1902. (Docket No. 87.) Decided December 29, 1902.

Otis Lincoln presented for probate an instrument, in form a deed, as the last will and testament of Laura L. Felt, deceased. The instrument was disallowed in the

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probate court on a contest by Noah Felt and others, the husband and heirs at law of deceased, and proponent appealed to the circuit. From a judgment for proponent, contestants bring error. Affirmed.

Jasper C. Gates, for appellants.

Wells, Angell, Boynton & McMillan (*Samuel W. Burroughs*, of counsel), for appellee.

MONTGOMERY, J. This controversy relates to the probate of an instrument, in form a deed, as the last will and testament of Mrs. Laura L. Felt. Mrs. Felt was proponent's mother. The contestants are the three children of Mrs. Felt by her second marriage. It appeared that she was the owner of a 29-acre piece of land,—that in controversy in this case,—and that her husband was the owner of a 50-acre piece. In these circumstances Mrs. Felt sought to make some provision for proponent, who would not inherit from her second husband. The testimony adduced on the part of proponent tended to show that she executed a paper in the form of a warranty deed, covering the 29-acre tract; that it was found by proponent, after her death, with her other private papers; that he examined it at that time, and put it back in the box, which was locked, and the keys of which were kept by his half-brother; that after the funeral, when the box was again opened, the paper was gone, and has never since been found. The inference was doubtless drawn by the jury that the paper was abstracted by one of the half-brothers from the box, and there was testimony tending to support this view. The fact that there was a deed of some character in existence does not rest upon the testimony of the proponent alone, but is not only corroborated by other witnesses, but by a letter admittedly in the handwriting of one of the contestants.

On the trial the contestants presented but two requests to charge, which were as follows:

"1. The proponent having testified that he read the

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names of the witnesses to the deed and the name of the notary public who witnessed the acknowledgment of the deed, and that they were strangers to him, and that he cannot remember the name of either of them, such a deed cannot be the deed which the witness Hamilton testified he and his wife witnessed and Slinger took the acknowledgment of, for the reason that the proponent testifies that he had known Slinger all his life, and that he had known Hamilton, who had lived within three-quarters of a mile of his mother for many years before her death.

"2. The paper which proponent claims that he found must be shown to be the identical paper which Hamilton claims he witnessed, to entitle proponent to recover. There is no evidence of identity, and the verdict must be for the defendants or contestants."

After the verdict in favor of proponent, a motion for a new trial was made, one ground of which was that the testimony did not establish the execution of an instrument of testamentary character. It is argued in this court that error was committed in refusing each of the two requests, and in refusing to grant a new trial upon the ground stated. It is argued that the testimony of the proponent given on a previous trial before Judge Frazer was to the effect that he had seen the names of the notary and the witnesses, and that they were strangers to him; and it is contended that the testimony on this trial shows that he was acquainted with those whose names appeared as witnesses, and that this showed that the instrument which proponent saw was not the one testified to by other witnesses in the case.

It would extend this opinion to too great length to set out the testimony in full given by the proponent. It should suffice to say that, in our opinion, whatever inconsistencies there may have been in his testimony on the two occasions was a question for the jury, and affected his credibility only. *Eastman* v. *Railway Co.*, 101 Mich. 597 (60 N. W. 309). The first request of contestants was, therefore, properly refused.

The second request, so far as it was proper, was covered by the charge of the court. But one deed was referred to

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in the charge of the court or in the testimony, and the court said in his charge that the deed propounded "is a deed purporting to be signed—that is, the original—by Mrs. Laura Felt, to be witnessed by Hamilton and his wife, and to be acknowledged. It is the theory that the deed, just as the reproduced one I hold in my hand,—the one we have been talking about, made an exhibit in this case,—that a similar deed to this was signed in the lifetime of Mrs. Felt, and left with her private papers, and found there at the date of her death." At the close of the charge, contestants' counsel asked the court orally to charge that "the jury must find that the instrument which Lincoln says he found in the box and the one which Hamilton testified to having witnessed,—they must find that to be the identical paper." The court said:

"That is right, because the same witnesses must be to it. Well, that is correct; I had given it to the jury, if that is the paper; that Lincoln claims that the deed giving him the property was signed by Mr. and Mrs. Hamilton as witnesses."

There could be no room for the jury to mistake this, and we think the question of the identity of the paper was fairly a question for the jury upon this record.

The contention made upon the motion for a new trial, that the court erred in submitting the case to the jury, for the reason that the testimony failed to establish the execution of an instrument of testamentary character, presented that question to the court for the first time, and this might be sufficient ground for refusing a new trial; but, more than this, we think that there was testimony which tended to show that the deed in its terms was limited to take effect after the death of the grantor. The proponent testified that he examined the instrument, saw that it was a warranty deed, and "turned it over, and saw that it described the land there, and also down further that it was to go to me after her death." A Mrs. Waldron testified that decedent said she had made the homestead property to her son,—"it should take place after her death; he was to have it."

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The theory of the contestants is that the testimony, fairly construed, shows that this conveyance was an instrument of absolute conveyance, with a reservation of a life estate to the grantor. Unfortunately the deed cannot be produced, and the testimony tends strongly to show that the proponent is in no way responsible for that fact. Upon this record it is not a matter of surprise that the jury should have taken the testimony most favorable to the proponent. If the deed was in form a deed to take effect after the death of the grantor, it is clear that, within our previous decisions, proponent was entitled to the probate of it as a will. *Bigley* v. *Souvey*, 45 Mich. 370 (8 N. W. 98); *Lautenschlager* v. *Lautenschlager*, 80 Mich. 285 (45 N. W. 147); *Ferris* v. *Neville*, 127 Mich. 444 (86 N. W. 960, 54 L. R. A. 464). In the present case the court charged the jury that, to entitle the instrument to probate as a will, it must be found that the instrument was executed in the form of a warranty deed, giving to proponent the land described, and, second, that Mrs. Felt executed the instrument with the intent that the gift should take effect only after her death, and that that intent was expressed in the instrument in some appropriate form. If the jury so found, it brings the case within our previous holdings.

The case appears to have been tried without error to the prejudice of contestants, and the order will be affirmed.

HOOKER, C. J., MOORE and GRANT, JJ., concurred.

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HALPIN *v.* WAYNE CIRCUIT JUDGE.

FORECLOSURE—COSTS AGAINST CODEFENDANT.

Where, in a foreclosure suit, a tenant of the mortgagors appears and disclaims, he cannot recover costs against his codefendants, the mortgagors, who have not appeared.

Mandamus by William H. Halpin and Mary J. Halpin to compel Joseph W. Donovan, circuit judge of Wayne county, to set aside an order for costs against relators. Submitted November 11, 1902. (Calendar No. 19,596.) Writ granted December 29, 1902.

One David P. Lapham filed a foreclosure bill in equity against William H. Halpin, his wife, Mary, and one Pierce. Halpin was the mortgagor. Upon the chancery subpœna was indorsed that no personal decree was claimed against Mary Halpin or Pierce. The bill was taken as confessed against the Halpins. Pierce filed a brief answer that he was living on the premises as the tenant of Halpin; that his lease expired in March, 1902; that he was ready and willing to vacate the premises and to comply with the order of the court,—and asked the direction of the court as to what he should do in the premises. After the decree was rendered in favor of the complainant, the court made a supplemental order allowing $30 costs to Pierce against the relators. The relators moved to set this order aside, which the court refused, and they now seek the writ of *mandamus* for that purpose.

J. Emmet Sullivan, for relators.

Harry H. Wait, for respondent.

PER CURIAM. We are not aware of any rule of law or equity to authorize this order. The Halpins did not appear. Defendant Pierce appeared and disclaimed. If he was

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entitled to any costs, it was against the complainant, and not against his codefendants.

The writ will issue, with costs to relators.

JACOBS v. WAYNE CIRCUIT JUDGE.

1. JUSTICES' COURTS—JURISDICTION—CERTIORARI.
   Where a defendant appears and pleads to the jurisdiction of a justice of the peace, which issue is decided against him, and no appeal is taken or notice given of an intention to remove the cause to the circuit court by *certiorari* within five days, as provided by statute, the common-law writ of *certiorari* will not lie to review the decision.

2. SAME.
   The common-law writ of *certiorari* will lie to remove a case from justice's court only where the statutory remedy is impossible of application.

3. SAME—MANDAMUS.
   Mandamus will lie to compel a circuit judge to dismiss a common-law writ of *certiorari* issued to a justice of the peace, where the party was not prevented from appealing or obtaining the statutory writ by circumstances beyond his control.

Mandamus by Abram Jacobs to compel Flavius L. Brooke, circuit judge of Wayne county, to dismiss a writ of *certiorari*. Submitted November 18, 1902. (Calendar No. 19,595.) Writ granted December 29, 1902.

The relator brought suit in justice's court against the Grand Trunk Railway Company for breach of a contract of carriage. The first summons was not served. An *alias* summons was issued and duly served. The defendant appeared. Several adjournments were had. On the day of the final adjournment, plaintiff filed his declaration. Defendant filed a plea to the jurisdiction, alleging that the cause of action accrued in Canada, that the defend-

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ant was a foreign corporation, and that therefore the justice had no jurisdiction. Issue was joined upon this plea, proofs were taken, and the plea was overruled. The defendant thereupon appeared no further in the case, and on June 17, 1901, a judgment was rendered against it for $104.39. About two weeks afterwards, application was made to the circuit court for leave to appeal, and was denied. On August 2, 1901, the company made an application for the writ of *certiorari*, alleging want of jurisdiction in the justice's court for the reason above stated. The respondent allowed the writ. Relator thereupon moved to dismiss the writ, which motion was denied, and he now seeks to compel the dismissal of the writ of *certiorari* by the writ of *mandamus* from this court. In denying the motion the respondent stated that he doubted the authority of the court to allow the writ.

Bowen, Douglas & Whiting and *James O. Murfin*, for relator.

E. W. Meddaugh and *L. C. Stanley*, for respondent.

GRANT, J. (*after stating the facts*). 1. The railway company knew, or should have known, of the judgment rendered against it in season to transfer the case to the circuit court by one of the statutory methods,—appeal or *certiorari*. It is not claimed that it was prevented from taking such steps by circumstances beyond its control. It could have appealed generally or specially, or procured a writ of *certiorari*, in accordance with section 935 *et seq.*, 1 Comp. Laws. Instead, it chose to wait nearly two months, and then apply for the common-law writ of *certiorari*. The want of jurisdiction does not appear upon the face of the proceedings. It was a question of fact, to be determined by the proofs showing where the cause of action arose, and whether the company was a foreign corporation. The justice's court decided this question of fact against the company upon the evidence before it. Under the statute (section 936, 1 Comp. Laws), the company was

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required to give the justice notice in writing, within 5 days after the rendition of the judgment, of its intention to remove the cause to the circuit court by *certiorari*, and to make its affidavit therefor within 30 days. If the contention of the company be sustained, it follows that every case which can be taken to the circuit court by the statutory writ of *certiorari* can also be taken there by the common-law writ. If this be so, the statute is useless.

In the review of drain proceedings by the writ of *certiorari*, we held that the common-law writ is open only in cases where the statutory writ is not possible of application. *Township of Blumfield* v. *Brown*, 130 Mich. 504 (90 N. W. 284); *Moore* v. *McIntyre*, 110 Mich. 237 (68 N. W. 130). The same reason for limiting the time for obtaining the writ in drain proceedings applies with equal force to suits before justices of the peace, and is sufficiently stated in *Township of Blumfield* v. *Brown*. Where the statutory remedy is gone, and the party aggrieved had no knowledge of the suit, it is held that the common-law writ may issue, in order to prevent a miscarriage of justice. *Withington* v. *Southworth*, 26 Mich. 381; *Adams* v. *Abram*, 38 Mich. 302; *White* v. *Boyce*, 88 Mich. 349 (50 N. W. 302). Clearly, the sole purpose of the statute is to compel a party to proceed seasonably if he chooses to adopt the remedy by *certiorari*, and to avoid the long delay incident to the use of the writ under the common-law practice. The statute does not take away the right to issue the writ, but only limits the time within which parties must proceed. We think the only exception to proceeding under the statute is where the party aggrieved has had no opportunity to proceed under it. This is not a case where the court may exercise its discretion in issuing the writ. The question is whether the statute compels a party to proceed under it when he has ample opportunity to do so. The company had lost its right to the writ of *certiorari*.

2. It is also urged on behalf of respondent that *mandamus* is not the proper remedy. This court has, without

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exception, entertained jurisdiction to dismiss appeals from justice's court when allowed by the circuit court after the expiration of five days, where the party was not prevented from appeal by circumstances beyond his control. We see no reason why we should not adopt the same rule where the party has ignored that remedy, and seeks another, where he has chosen to ignore the plain provision of the statute regulating the practice in such cases.

The writ will issue, with costs.

The other Justices concurred.

PEOPLE *v.* SMITH.

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1. SEDUCTION—PREVIOUS UNCHASTITY.

Where, in a prosecution for seduction committed on the 30th of April, the complaining witness testified to previous acts of illicit intercourse with respondent in February and early in April of the same year, and there was no evidence of reformation on her part, the court should have directed a verdict of acquittal.

2. SAME—INDUCEMENT—CONDITIONAL PROMISE OF MARRIAGE.

A person cannot be convicted of seduction whose only inducement to procure the illicit intercourse was a promise to marry the woman if she became pregnant.

Error to Benzie; Chittenden, J. Submitted November 21, 1902. (Docket No. 225.) Decided December 29, 1902.

Alba Smith was convicted of seduction. Reversed.

D. G. F. Warner, for appellant.

M. M. Larmonth, Prosecuting Attorney, for the people.

CARPENTER, J. Defendant was convicted of the crime of seduction. The information charged that the offense

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was committed on the 30th of April, 1901, in the township of Homestead, in the county of Benzie. The complaining witness testified that she was 20 years old in August, 1901; that she had sexual intercourse with the defendant on or about the date named in the information, and also in February and early in April, 1901; that on each of these occasions defendant promised that, if she got in the family way, he would marry her; that she became pregnant, and was delivered of a child on the 19th of January, 1902.

At the conclusion of the people's case, counsel for the defendant requested the court to instruct the jury—

"To render a verdict of not guilty, as the evidence in the case discloses * * * that respondent had illicit intercourse with the complaining witness in February and in April prior to the time charged. It follows that she is not a person who could be seduced at the time alleged in the complaint, warrant, and information. And there has been no sufficient promise to marry proven. She could not be said to be a chaste person at the time alleged."

This request was denied, to which defendant excepted. In his charge to the jury, the court said:

"The girl, Miss Brown, has gone on the stand, and testified that the respondent had, on every occasion when they had intercourse, promised to marry her. I charge you, as a matter of law, that, if this respondent did have sexual intercourse with this girl at the time alleged in the information, and, in order to persuade her to allow him to have such sexual intercourse, did make this promise, no matter whether he intended to carry this promise out or not, if this girl relied on his promises and inducements at that time, and allowed him to have sexual intercourse with her, and if she was a chaste character, then I charge you that the defendant is guilty of this crime as charged in the information."

To this part of the charge defendant assigns error.

In the case of *People* v. *Clark*, 33 Mich. 112, the lower court permitted the jury to find the defendant guilty of

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seduction because of illicit intercourse in August, 1873, though the complaining witness testified that she had such intercourse with the defendant not only in August, but on the preceding 28th of July. In deciding this case the court said:

"We do not wish to be understood as saying that, even as between the same parties, there could not be a second, or even third, act of seduction; but, where the subsequent alleged acts follow the first so closely, they destroy the presumption of chastity which would otherwise prevail, and there should be clear and satisfactory proof that the complainant had in truth and fact reformed; otherwise there could be no seduction. * * * And, although the female may have previously left the path of virtue on account of the seductive arts and persuasions of the accused or some other person, yet, if she has repented of that act, and reformed, she may again be seduced. We do not say that there may not have been a reformation in this case. Indeed, there may have been many, but they were unfortunately fleeting. Had a reasonable time elapsed between the different acts, a presumption in favor of a reformation might arise; but we think no such presumption could arise in this case, and that the burden of proving such reformation would be upon the prosecution."

This decision is decisive of the case at bar. As the people introduced no evidence whatever tending to show a reformation on the part of the complaining witness after the illicit intercourse of the preceding February and early in April, it was the duty of the court to direct the acquittal of defendant, as requested.

There is, in our judgment, however, a more serious error in the case. All that the defendant did, according to the testimony of the complaining witness, to induce her to have illicit intercourse with him, was to promise to marry her if she became pregnant. Does sexual intercourse, induced by such a promise, constitute seduction? In the case of *People* v *De Fore*, 64 Mich., at page 699 (31 N. W. 585, 8 Am. St. Rep. 863), Justice CHAMPLIN says:

"And it has been held that, when the female submitted

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through a promise of marriage conditioned upon the act resulting in pregnancy, the crime was committed. *People* v. *Hustis*, 32 Hun, 58; *Kenyon* v. *People*, 26 N. Y. 203 (84 Am. Dec. 177)."

People v. *Hustis* sustains the proposition for which it is cited. This decision, however, was made in a lower court, consisting of three judges, one of whom filed a vigorous dissenting opinion. The only argument advanced in the majority opinion was the claim that the case was ruled by *Kenyon* v. *People*, above cited in the quotation from Justice CHAMPLIN'S opinion. The case of *Kenyon* v. *People* holds this, and only this: That it is a sufficient promise of marriage, under the New York statute creating the crime of seduction (in which illicit connection under promise of marriage is the gist of the offense), "that the defendant promised to marry the prosecutrix if she would have carnal connection with him." The case of *Kenyon* v. *People* is, therefore, no authority upon the question under discussion, and furnished no justification whatever for the decision of *People* v. *Hustis*.

The best definition of seduction contained in our Reports was framed by Mr. Justice MONTGOMERY, when, as circuit judge, he tried the case of *People* v. *Gibbs*, and will be found in the report of that case in 70 Mich., at page 430 (38 N. W. 257):

"Seduction may be defined to be the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions, or wiles which are calculated to have, and do have, that effect, and resulting in her ultimately submitting her person to the sexual embraces of the person accused."

This is in harmony with the case of *People* v. *Clark*, 33 Mich., at page 116, where it was said:

"Illicit intercourse alone would not constitute the offense charged. In addition to this, the complainant, relying upon some sufficient promise or inducement, and without which she would not have yielded, must have been drawn

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aside from the path of virtue which she was honestly pursuing at the time the offense charged was committed."

As well as the case of *People* v. *De Fore*, 64 Mich., at page 699 (31 N. W. 585, 8 Am. St. Rep. 863), where it was said:

"An act of intercourse, induced simply by mutual desire of the parties to gratify a lustful passion, would not constitute the crime charged in the information. The charge of seduction and debauchery implies that a pure woman will resist, and that the natural sentiment of virtue and of purity will be overcome by a promise of marriage and other means, and submission to his desires finally obtained through such inducements."

Where the woman is a young, inexperienced girl, the courts very properly hold that promises and means are sufficient which would not move a woman of mature years. *People* v. *Gibbs*, 70 Mich., at page 427 (38 N. W. 257). The complaining witness in this case, however, was not a young and inexperienced girl. She was nearly 20 years of age, and, it is apparent, knew quite well the consequences of her act. She cannot complain, therefore, if she is judged by the rules applicable to ordinary pure women.

Is a promise to marry, conditioned upon the illicit intercourse resulting in pregnancy, calculated to induce a pure woman to yield her chastity? In our judgment, this question admits of but one answer. Such a promise has no tendency to overcome the natural sentiment of virtue and purity. The woman who yields upon such a promise is in no better position than as though no promise whatever had been made. No wrong is done her if she is put in the class with those who commit the act to gratify their desire. She was willing to lose her virtue if some provision was made to conceal its loss. If pregnancy does not result from the illicit intercourse, her conduct is, in every respect, as culpable as that of her companion. If pregnancy does result, his conduct becomes more culpable than hers when, and not until, he refuses to marry her. The

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commission of the offense cannot depend upon the happening of a subsequent event, though it is to be noted in this case that the complaint is made, not of the intercourse in February, 1901, when the complaining witness lost her virtue, but of the intercourse in the following April, which apparently resulted in her becoming pregnant.

The verdict must be set aside, and a new trial ordered.

The other Justices concurred.

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WILCOX v. MORTON.

1. TROVER—RESCISSION OF SALE—CONVERSION—DAMAGES.
   Where, in a trade of lands for a stock of goods, plaintiff fraudulently misrepresented the character of the lands, and defendant seized the stock of goods two days before tendering a reconveyance of the lands, plaintiff was entitled to recover, in an action of trover for the technical conversion, not more than nominal damages.

2. DAMAGES—JUDGMENT—ERROR.
   A judgment for defendant will not be set aside where it appears that plaintiff is entitled to no more than nominal damages, and a judgment in his favor would not carry costs.

Error to Eaton; Smith, J. Submitted December 2, 1902. (Docket No. 131.) Decided December 29, 1902.

Trover by Freeman W. Wilcox against Thomas P. Morton and Amanda Morton. From a judgment for defendants, plaintiff brings error. Affirmed.

Rollin H. Person, for appellant.

Huggett & Dann, for appellees.

MONTGOMERY, J. Plaintiff traded to defendants land for a hardware stock. Plaintiff fraudulently misrepre-

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sented the character of the land. Defendants seized the hardware stock with the purpose of rescinding the trade. The seizure was made on Saturday, and the deeds of the land conveyed were not tendered to plaintiff until the following Monday. Thereafter the plaintiff instituted this action of trover. The defendants recovered, and plaintiff brings error.

Plaintiff's contention is that his right of action was complete when defendants seized the goods on Saturday, and that the subsequent rescission does not bar the action or mitigate damages. If the plaintiff is wrong as to either contention, the verdict ought not to be disturbed, as we have frequently held that a judgment for the defendant will not be set aside where it appears that plaintiff is entitled to no more than nominal damages. *Hickey* v. *Baird*, 9 Mich. 32; *Haven* v. *Manufacturing Co.*, 40 Mich. 286.

We are cited to no case which precisely defines the rights of the parties, but the case can be determined on principle without difficulty. The plaintiff's fraud vitiated the contract at the election of the defendants. That the defendants had, before the present suit was instituted, made their election to rescind, and had done all that was needful to place the plaintiff *in statu quo*, is unquestioned. The question, therefore, is whether the fact that defendants were premature in seizing this property before tendering the deeds of the real estate cut off for all time their right to rescind. To give this effect to the transaction would be to impose a very severe penalty upon premature action, for it is clear that the seizure was no intentional waiver of the right of rescission. It may be true that a right of action accrued to plaintiff, but such right of action was subject to be defeated by the termination of his title before suit brought. *Clapp* v. *Glidden*, 39 Me. 448. The tender of deeds on Monday terminated plaintiff's title.

This case is quite unlike *Dalton* v. *Laudahn*, 27 Mich. 529. In that case defendant seized property of plaintiff under an assumed power, which did not in fact authorize

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such seizure at the time. It was held that the fact that he might, at a later time, have had authority to seize the property under the power, and make the same disposition he did in fact make of it, afforded no defense. It was said:

"Dalton had no interest in the property by force of the agreement, nor any right to take it on the 20th. Laudahn was owner, and had full legal right to dispose of the chattels at any time during that day, and make the money to pay the rent."

In the present case, the fraud of plaintiff having been established, it follows that, as between himself and defendants, the plaintiff had no right to dispose of the property in question at any time in such manner as to cut off defendants' right to rescind. The defendants having completed their rescission, the property ceased to be the property of plaintiff, and, if there was a prior technical conversion, the plaintiff was entitled to recover no more than nominal damages, if anything.

The judgment will be affirmed.

The other Justices concurred.

DREW v. BILLINGS-DREW CO.

BALDWIN v. KING.

1. CORPORATIONS—AGENCY—LEASE.

A vice-president of a corporation, having entire charge of one department of the company's business, and acting as manager and agent, has authority to bind the company in leasing a room for the necessary storage of the company's property.

2. LEASE—SURRENDER BY OPERATION OF LAW.

A lessee of a building formed, with others, a corporation to carry on his business. The lessor declined to accept the corporation as his tenant for the unexpired term, but agreed

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with the corporation, through its agent, who was also the lessee, that the company might occupy the building at the same rental until he could find another tenant. *Held*, that the lease was surrendered by operation of law, and the corporation liable for the rent during the time it occupied the building.

3. SAME—STATUTE OF FRAUDS.

A verbal lease which is to continue until the lessor can secure another tenant is capable of performance within a year, and, if terminated within that time, is not void under the statute of frauds. 3 Comp. Laws, § 9509.

Appeal from Wayne; Brooke, J. Submitted December 2, 1902. (Docket No. 132.) Decided December 29, 1902.

Bill by Walter B. Drew against the Billings-Drew Company, under which Charles A. King was appointed receiver. Stephen Baldwin intervened and presented a claim against defendant. From a decree for the intervener, the receiver appeals. Affirmed.

Intervener, Baldwin, leased to complainant, Drew, a three-story building (No. 62 Miami avenue, Detroit) for three years from November 1, 1896. The lease was a written one, and provided for a monthly rental of $75. Drew occupied the building for displaying and selling electric and gas fixtures and wooden mantels until February 10, 1898. One Billings was carrying on a similar business on Woodward avenue. February 10, 1898, Billings, Drew, and one Thomas Drew organized the defendant corporation. The directors were Mr. Radford, complainant, and Billings. Radford was president, Drew vice-president, and Billings secretary and treasurer. Drew and Billings conveyed their respective stocks of goods to the corporation, which established its business in the University Building, on Wilcox street. Drew's former stock of goods was immediately removed from No. 62 Miami avenue to the University Building, and some of Billings' stock of goods was removed from his store to the University Building, and the balance to 62 Miami avenue, and there stored.

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On July 19, 1898, Drew filed the bill of complaint in this cause against the company, and defendant King was appointed receiver. It is conceded that the company occupied Baldwin's building for the storage of its property until about May 10, 1898. It is claimed on the part of the receiver that all the property of the company was then removed, while it is claimed on the part of the intervener that the building was still occupied by the company, and that the property was not all removed until September. Mr. Baldwin, claiming that the lease between him and Drew was surrendered upon the organization of the corporation, and that the corporation agreed to pay him rent while his building was occupied by it at the rate of $75 a month, presented a claim to the court for the rent from February 10 to September 1, 1898. The court allowed the claim, and the receiver appeals.

Barbour & Rexford, for appellant.

Tarsney & Fitzpatrick, for appellee.

GRANT, J. (*after stating the facts*). Four defenses are interposed:

1. There is no evidence to establish the alleged agreement.
2. Drew had no authority to make it.
3. Drew, if authorized to rent storage room, could not, as the company's agent, without the consent of the directors, relieve himself of the obligations of the lease, and impose them upon the company.
4. The agreement, if any, was not in writing, and is void under the statute of frauds.

1. We think there was sufficient evidence to establish the agreement. Mr. Baldwin testified that Mr. Drew informed him of the organization of the corporation, and asked him if he would object to the company's occupying the premises; that Baldwin replied that would be owing somewhat to what they wanted to occupy it for,—that he objected to putting heavy goods in the building; that Drew said the goods would not be heavy, but light.

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"I told him I would object to Billings and Drew carrying out that lease and using it as a storehouse, but that I would let them occupy it until I got a chance to rent it. They were to pay the same as the lease,—$75 per month."

Pursuant to this agreement, the corporation occupied the building. In September, Baldwin obtained an opportunity to lease the building, and notified the company to vacate. Mr. Billings testified that he knew the building was occupied by the corporation, and that it was not to be occupied rent free, but he supposed Drew would take care of the rent, as he (Billings) took care of his own; meaning the rent of the store formerly occupied by him on Woodward avenue. We think there was sufficient testimony to establish the agreement.

2. Drew was vice-president of the company, and had the entire charge of the gas-fixture department. He was not acting solely in his capacity as vice-president, but as the agent of the company in control of one department of its business. If it was necessary to procure storage for some of the property under his control, he, as manager and agent, had the power to bind the company in leasing room for that purpose. His action was taken in good faith, and was evidently known to all the directors and stockholders of the corporation. His act was within the scope of his authority. 3 Clark & M. Corp. §§ 686,700,702, and authorities there cited.

3. It was not in the power of Mr. Drew to impose his lease upon the corporation without the consent of the directors, but we do not think this was the effect of the transaction. The evidence shows that the fair value of the rental was $75 per month. Drew had gone out of business. Mr. Baldwin's building was required for the purposes of the corporation. Drew informed Mr. Baldwin of the situation. Baldwin declined to accept the corporation as his tenant under the lease, but was willing to lease the building to the corporation at the same rental as Drew had agreed to pay him until he could secure another tenant. The result was that Baldwin released Mr. Drew,

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and accepted the corporation in his stead as tenant. A surrender resulted by operation of law. *Stewart* v. *McLaughlin's Estate*, 126 Mich. 1 (85 N. W. 266, 87 N. W. 218); *Donkersley* v. *Levy*, 38 Mich. 54; *Gingrass* v. *Mather*, 128 Mich. 582 (87 N. W. 758); *Youell* v. *Kridler*, 105 Mich. 344 (63 N. W. 439).

4. It follows from what has already been said that the statute of frauds does not apply. There was a surrender of the old lease and the making of a new one. The time fixed by the new lease was indefinite. It was capable of performance within a year, and was in fact performed within that time. It was therefore valid. *Smalley* v. *Mitchell*, 110 Mich. 650 (68 N. W. 978); *Carr* v. *McCarthy*, 70 Mich. 258 (38 N. W. 241).

The decree is affirmed.

HOOKER, C. J., MOORE and MONTGOMERY, JJ., concurred. CARPENTER, J., did not sit.

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SUPREME TENT OF THE KNIGHTS OF THE MACCABEES OF THE WORLD *v.* MCALLISTER.

1. HUSBAND AND WIFE—MARRIAGE CONTRACT.
   Where a man and woman entered into a marriage contract in good faith, and continued to live and cohabit together as husband and wife, no formal ceremony was essential to the validity of the marriage.

2. SAME—DIVORCE—MUTUAL BENEFIT INSURANCE.
   Where a man and woman lived and cohabited together as husband and wife in good faith, under the mistaken belief that she was divorced from her husband, and the man obtained a certificate of insurance in a mutual benefit association whose by-laws provided that payment should be made to the wife, husband, children, dependent, mother, etc., of a member, at his death the insurance should be paid to her, rather than his mother, who, with full knowledge of the facts, had for 18 years treated them as husband and wife.

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3. SAME—PUBLIC POLICY.

It is not contrary to public policy to permit mutual benefit associations to issue policies in favor of those who live and cohabit together in the honest belief that they are husband and wife, although one of them may have been married before and not legally divorced.

Appeal from Eaton; Smith, J. Submitted December 2, 1902. (Docket No. 126.) Decided December 29, 1902.

Bill of interpleader by the Supreme Tent of the Knights of the Maccabees of the World against Clara E. McAllister and Eleanor McAllister to determine the right to the proceeds of an insurance policy on the life of William R. McAllister, deceased. From a decree for defendant Clara, defendant Eleanor appeals. Affirmed.

Defendant Eleanor is the mother, and defendant Clara is the alleged widow, of William R. McAllister, deceased. October 2, 1890, complainant, a beneficiary association organized under the laws of Michigan, issued to William, then a resident of New York State, a policy of $2,000, payable to Clara E. McAllister, his wife, as beneficiary. Subsequently William and Clara removed to Findlay, Ohio, where he died January 16, 1901. Complainant files this bill of interpleader to determine which one is entitled to the insurance.

Clara and William in 1883 entered into a contract of marriage, but no ceremony was performed. The circuit judge found that this contract was entered into in good faith, and was consummated by a continuous living and cohabiting together as husband and wife, and by holding themselves out to the world as such, until his death. For 18 years these parties lived in Michigan, New York, and Ohio as husband and wife, were received in society as such, were known as such in every place where they lived, and were recognized as such by the defendant Eleanor and other members of her family. She visited them, and they visited her. The circuit judge, in his finding, said:

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"It is seldom, where the life in the home for so long a time is laid bare before a court, that the record is as clean, and the loyalty to each other and the trust and confidence in each other are as great and strong, as the proofs show it to have been in this case."

The proofs sustain this finding. William was ill for some time previous to his death, and Clara did menial work to earn money to support him and to pay the insurance dues. The defense to her claim is that she had been previously married to one Baker, and that she never had been divorced. She admits her marriage to Baker in 1875 in the State of New York; that she lived with him until 1882; that they had one child; that they separated, and she came to Michigan. Defendant Eleanor insists that there is no proof of a divorce from Baker, who is still living. The evidence upon this point is that Baker delivered to a Mr. Hall, of Gowanda, N. Y., a document purporting to be a decree of divorce issued from a court in Pennsylvania, dissolving the marriage of Baker and his wife. Mr. and Mrs. Hall both testify that Mr. Hall received such a document from Baker; that they read it; that it purported to be a decree of divorce; that they then sent it to Clara, at Charlotte, Mich., where she was then living. It is proved conclusively that this document, whatever it was, was received by Clara. This was before her marriage with William. Relying upon this as a valid divorce, she and William contracted the marriage. The deposition of Baker was taken on behalf of Eleanor, and he testified that he gave her a document; that he thought it was an agreement of separation, and not a divorce; and that he was never legally divorced from her. The court held that Clara was legally entitled to the fund.

Joseph L. Hooper and *L. H. Sabin*, for appellant.

Dean & Davids, for appellee.

GRANT, J. (*after stating the facts*). The marriage was valid if the parties were competent to contract it. No

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formal ceremony is essential to the validity of a marriage. *Hutchins* v. *Kimmell*, 31 Mich. 126 (18 Am. Rep. 164); *Peet* v. *Peet*, 52 Mich. 464 (18 N. W. 220).

Counsel for defendant Eleanor cite authorities holding that a marriage is void if either party thereto has another wife or husband living. The validity of a marriage does not depend upon the good faith of the parties entering into it. Both parties must be competent to contract. Unless both are single, their marriage is void, however innocently they may have entered into that relation. It is not necessary to cite authorities to this proposition. But this rigid rule has not been applied in insurance policies of mutual benefit associations, now so common, where the parties have acted in good faith. The policy in this case was not issued under section 7740 *et seq.* of the Compiled Laws. That was an act passed in 1893 (Act No. 119, Pub. Acts 1893), while this policy was issued in 1890. The record does not contain the articles of association under which the policy was issued. The act of 1893 expressly provides "that when the laws of any such association already provide that an affianced wife, or any other person who is dependent upon the member for maintenance, food, clothing, lodging, or education, may be made the beneficiary, payment of death benefits may be made to such beneficiaries." The briefs do not refer to the original articles of association, or cite the act under which the original association was organized. Counsel for defendant Eleanor quote a by-law of the association applicable to this case, and admitted by them to be consistent with the charter. That by-law reads as follows:

"No life benefit certificate shall be made payable to any person other than the wife, husband, children, dependent, mother, father, sister," etc., "of the member."

We will assume, therefore, that this is the by-law which controlled the rights of these parties at the time the policy was issued.

It is admitted that defendant Clara was legally married to Baker, and that he is still alive. We will not determine

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whether the proofs show that she was legally divorced from him, as we deem it unnecessary to determine this question. It is clear that she believed she was, and that William also so believed. Both believed that they were competent to enter into the marriage relation. They did so, and faithfully lived by their obligation until death parted them. She was not the mistress of William, nor was this policy a "wager" policy, under *Mutual Ben. Ass'n* v. *Hoyt*, 46 Mich. 473 (9 N. W. 497). This contract was made in New York, and the decisions of that State should have great, if not a controlling, force in determining the rights of these parties. *Story* v. *Mutual Ben. Ass'n*, 95 N. Y. 474, is the parallel of this in its facts. Mary Story had in good faith occupied the position of the wife of Robert Story for 16 years. He had another wife living. The by-laws of the association in that case required the fund to be paid over to the widow; if no widow, then to the children, etc. The court said:

"It may be true that the by-law which prescribes the obligation and duty of the association on the death of a member contemplated a payment to the person who should be the lawful widow of a deceased member. But this was not a limitation of the power of the company, so as to prevent it from recognizing as the beneficiary a person who might be designated by the member as holding to him the relation of wife. Such designation made during the lifetime of the member, and assented to by the company, until changed by the mutual agreement of the member and the company, or at least until the arrangement was repudiated by one of the parties thereto, was binding."

Supreme Lodge A. O. U. W. v. *Hutchinson*, 6 Ind. App. 399 (33 N. E. 816), is another similar case. The law there provided that the beneficiary must be one or more members of the assured's family, some one related to him by blood, or who should be dependent upon him. He had named as beneficiary a woman who had lived with him as his wife, and who had borne him children. She had no knowledge that he had a lawful wife living. It was held that, though she was not in fact his wife, yet

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she was dependent upon him, and had a moral right to look to him for support, and her claim to the fund was sustained. See, also, *Watson* v. *Mutual Life Ass'n*, 21 Fed. 698; *Overbeck* v. *Overbeck*, 155 Pa. St. 5 (25 Atl. 646); *Equitable Life Assur. Soc.* v. *Paterson*, 41 Ga. 338 (5 Am. Rep. 535); *Supplee* v. *Knights of Birmingham*, 18 Wkly. Notes Cas. 280.

Counsel for Eleanor cite *Keener* v. *Grand Lodge A. O. U. W.*, 38 Mo. App. 543. The court in that case found that for a period of about four years, with short periods of intermission, the deceased and the claimant, Katie Keener, "lived together in an unlawful, illicit, and licentious way." Even in the assignments of the certificates he did not designate her as his wife. In one he designated her as his "friend, Miss Katie Burke," and in the second as "Mrs. Katie Keener, bearing the relationship to myself of wife." In such cases there is no obligation, moral or legal, resting upon the assured to care for the woman. She is in no sense his wife, and not dependent upon him. In this case there is no taint upon either of the parties. For 18 years after assuming this relation they were faithful to each other. Though she may have failed to show a valid divorce, we think it not contrary to public policy to permit these mutual benefit associations to issue policies in favor of those occupying such a relation in the honest belief that they are husband and wife. If the assured, the beneficiary, and the association choose to recognize such contracts as valid, we think that it does not lie in the mouths of others to deny their validity,—especially in that of one who for 18 years, with full knowledge of the facts, recognized and treated the parties as husband and wife.

The decree is affirmed, with costs.

The other Justices concurred.

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STROUB v. MEYER.

1. NEGLIGENCE — DRIVING ON STREET — INJURY TO PEDESTRIAN — CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

   Plaintiff's wife, after dark, but when the streets were well lighted, attempted to cross from the curb to a street car, a distance of 24 feet. When starting, she looked up, and could have seen defendant approaching with a horse and buggy, at a rate of six miles an hour. There was a controversy as to the distance he was from her at the time. His horse was under control, and, seeing her danger, he reined in his horse, which slipped, and fell upon the pavement, striking and injuring her. *Held*, that whether defendant was guilty of negligence, and plaintiff's wife of contributory negligence, were questions of fact for the jury.

2. SAME.

   It may be negligence, under some circumstances, to drive along a crowded city street at a less rate of speed than six miles an hour.

Error to Kent; Perkins, J. Submitted December 3, 1902. (Docket No. 141.) Decided December 29, 1902.

Case by John B. Stroub against Barney Meyer for loss of services of and expenses in caring for his wife, caused by injuries resulting from defendant's negligence. From a judgment for plaintiff, defendant brings error. Affirmed.

Plaintiff sued the defendant to recover for the loss of the services of his wife, and the expenses incurred in taking care of her, from injuries claimed to have been the result of the defendant's negligence in driving his horse and carriage on one of the streets of the city of Grand Rapids. He recovered a verdict of $101.50. The accident happened after dark on the evening of October 11th, the last day of a street carnival. Mrs. Stroub was waiting with others for a street car, at the southeast corner of Canal and Bridge streets. It was raining. The stores

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and all the public places were lighted, as were also the electric lights in the streets. A car had come from the south, and stopped about 30 feet south of the south line of Bridge street for passengers to get on and off. Four persons—two women and two children—started from the sidewalk for the car, preceding Mrs. Stroub. Defendant drove along Canal street from the south, between the car and the curb, going, according to his own testimony, six miles an hour, and, according to other witnesses, faster. Mrs. Stroub and others, desiring to take the car, went from the curb to the rear of the car, thus going diagonally towards the defendant. Defendant was superintendent of the city lighting plant and the waterworks, and was driving from the former to the latter. There was no occasion for haste. One Kelly, his driver, was with him. The gong attached to his carriage was rung at frequent intervals. Mrs. Stroub, when about halfway from the curb to the car, was struck by the defendant's horse, thrown down, and injured. The distance in a direct line between the side of the car and the curb was about 24 feet. Defendant, upon seeing the danger she was in, reined in his horse, which slipped upon the pavement, fell upon his haunches, and slid from two to six feet. The witnesses do not agree upon the distance. The jury, in reply to three special questions, found that Mrs. Stroub, at the time of starting for the car, could see the defendant approach with his horse and buggy; that she then looked up the street towards the point whence defendant was approaching; and that defendant had his horse under control.

Moses Taggart (*Ganson Taggart*, of counsel), for appellant.

Dunham & Malcolm, for appellee.

GRANT, J. (*after stating the facts*). The defenses urged are no negligence on the part of the defendant, and contributory negligence on the part of Mrs. Stroub. We think both defenses were properly submitted to the jury. The law does not permit parties to drive under all circum-

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stances along the crowded streets of a city at the rate of six miles an hour. In some places, and under some conditions, it would be negligence to drive faster than a walk. It depends upon the condition of the streets, the number of people crossing, of carriages on it, the degree of light, and various other conditions. Defendant knew that people were getting on and off this car; that it had stopped for that purpose, and that those standing on the sidewalk would probably hurry across the street to reach the car. We are not prepared to say that, even under his own statement, he was not guilty of negligence in driving at the rate of even six miles an hour. It is said his horse was under control. So he might be under the driver's control if he was going 10 miles an hour. The fact that the driver had the horse well in hand, and that the horse was not frightened, do not show conclusively that the defendant was not guilty of negligence. It was his duty to approach this place at a rate of speed reasonably slow. Travelers on foot had as much right to the use of this street, to go to and from the car, as he had to ride along it. It was the duty of both to use reasonable care to avoid accident. It is well known that street cars in cities stop but a brief time to permit passengers to get on and off, and that passengers are required to move rather speedily.

The women who preceded Mrs. Stroub testified that they did not see defendant's horse and carriage. Let it be granted that they, as well as Mrs. Stroub, should have seen it. They were entitled to believe that defendant would approach the place at a reasonable rate of speed. Passengers differ as to the distance defendant was away from the place of the accident. It was raining. Many people were on the streets and sidewalks. Her conduct depended on the distance the horse and carriage were from her, and her ability to determine the speed at which they were approaching. It was a question for the jury to determine whether, under all the circumstances, Mrs. Stroub was guilty of negligence in attempting to cross.

Judgment affirmed.

The other Justices concurred.

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CROSSETTE *v.* JORDAN.

1. CORPORATIONS—AUTHORITY TO EXECUTE MORTGAGE.
   Authority for the execution of a chattel mortgage by a corporation is shown by a recital in its records that, at a meeting of all the stockholders (which included all the directors), the mortgage was read, and a motion made and carried approving the same.

2. SAME—FRAUD—STOCK SUBSCRIPTIONS.
   That stockholders, on the day before the corporation gave them a mortgage, paid the balance due on their subscriptions to its capital stock by giving it credit on its indebtedness to them, does not, as a matter of law, prove that there was fraud in the execution of the mortgage.

3. MANUFACTURING CORPORATIONS—REPORTS—ATTACHMENT—INSTRUCTIONS.
   Where there was no evidence that an attachment creditor (under whom defendant in a replevin suit claimed) had any information of reports filed by a manufacturing corporation with the Secretary of State, a request to charge that persons dealing with such corporations have a right to rely upon the fairness and honesty of the statements made therein, was properly refused.

4. CORPORATIONS—MORTGAGES—FRAUD—INSTRUCTIONS.
   Where the jury were instructed that, in determining the question of fraud in the execution of a mortgage by a corporation to its stockholders, they should take into consideration the relationship of the parties, defendant, who did not ask for a more detailed instruction, cannot complain that they should have been instructed that the relationship was such as to call for the utmost good faith on their part.

Error to St. Joseph; Yaple, J. Submitted December 3, 1902. (Docket No. 139.) Decided December 29, 1902.

Replevin by Isaiah R. Crossette against Samuel Jordan. From a judgment for plaintiff, defendant brings error. Affirmed.

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S. M. Constantine, for appellant.

B. E. & L. F. Andrews and *William Carpenter*, for appellee.

CARPENTER, J. This is an action of replevin for a quantity of shingles, valued at $193. Plaintiff claims to own the shingles as a purchaser at a foreclosure of a chattel mortgage given to him, as trustee for himself and Alice L. Crossette, by the Isaac Crossette Lumber Company, a corporation. The defendant is a constable, who, when the suit was commenced, held the property under an attachment issued at the suit of Harlan J. Dudley against said Isaac Crossette Lumber Company.

The sole question in controversy is whether or not the chattel mortgage which furnishes the foundation for plaintiff's title is valid. This chattel mortgage was executed November 27, 1897. It covered the entire stock in trade at Three Rivers, Mich., and the book accounts, of the mortgagor. It secured the payment of specified indebtedness amounting to $1,687. It also secured the payment of all advances made by the plaintiff during the life of the mortgage, by indorsement, guaranty, or otherwise, and of the renewals or extensions of the specified indebtedness. This specified indebtedness consisted of three notes made by said mortgagor, held by Alice L. Crossette, plaintiff's sister, amounting to $360, $35.71 owed the plaintiff by the mortgagor on open account, certain notes made by the mortgagor and held by the mortgagee, and certain notes made by the mortgagor, held by the First State Savings Bank of Three Rivers, "and all renewals of said notes, which said renewals," the mortgage stated, "the party of the second part [plaintiff] has agreed to indorse." The mortgage was at once properly recorded. The plaintiff indorsed the renewal notes as agreed, and soon after made other indorsements for the mortgagor's benefit. In February, 1898, the mortgage was foreclosed, and plaintiff purchased the mortgaged property for $2,100, which he testifies was less than the mortgagor owed him.

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Testimony was introduced on the trial tending to prove, if it did not conclusively establish, the validity of the indebtedness secured by said mortgage. The Isaac Crossette Lumber Company was a corporation organized by the heirs at law and widow of Isaac Crossette, deceased (plaintiff's father), in 1893, to carry on the business conducted by said Isaac Crossette during his lifetime. Plaintiff's mother was president of the corporation; plaintiff was its vice-president; plaintiff's sister Alice L. Crossette (mentioned in said mortgage) was its secretary and treasurer; and John L. Keyport, the husband of another of plaintiff's sisters, was its manager. Its place of business was Three Rivers, Mich. Plaintiff resided at Muskegon, Mich., and until the giving of the chattel mortgage had little to do with its management. On the evening of November 26, 1897, said plaintiff paid $300, the amount unpaid on his subscription for stock to said mortgagor corporation, by crediting that amount on his account against said corporation; and his sister Alice L. Crossette paid $450, unpaid on her stock subscription, by canceling her account for that amount against the corporation. This latter account was made up of $355 for salary due Miss Crossette from January to December, 1897, and $95, a portion of the salary owed by the corporation to her mother, which by common consent was transferred to her credit.

Defendant insists that the mortgage was invalid because its execution was not authorized by the board of directors of the corporation mortgagor, and that the testimony conclusively established its fraudulent character. The court below decided, as a matter of law, that the mortgage was regularly executed. It left the question of fraud to the jury, who found for the plaintiff. Defendant complains of both of these, as well as of numerous other, decisions of the trial court.

Due authority to execute the mortgage is proved by the records of the mortgagor corporation. They recite that at a meeting of the stockholders held November 27, 1897, when all of the stockholders—and this means all of the

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directors—were present, "the mortgage having been drawn up and read, a motion was made and carried, approving the same."

The ground upon which it is contended that fraud in the execution of the mortgage was conclusively established is that certain facts established on the trial are altogether inconsistent with good faith. It is a sufficient answer to this contention to say that some of these alleged facts were not only not conclusively established, but there was no evidence from which they might be inferred; that others were not conclusively established; and that the only one conclusively established (viz., the method adopted November 26, 1897, of paying the balance due on stock subscriptions) certainly did not, as a matter of law, prove that there was fraud in the execution of the mortgage.

Defendant complains because the court did not give the following request:

"Persons dealing with manufacturing corporations upon the strength of the reports which they are required to file with the Secretary of State and the county clerk, the knowledge of which is acquired through the usual channels, have a right to rely upon the fairness and honesty of the statements made therein."

There was nothing in the case to indicate that Harlan J. Dudley, the creditor in the attachment proceedings under which defendant claims, placed any reliance upon, or had any information whatever of, the reports referred to in the foregoing request. It would have been improper, therefore, for the court to give the request; and the charge to the jury that, in determining the question of fraud, they might consider "the reports of the company to the Secretary of State, and time or times they were made, whether correct or not, and, if incorrect, whether it was the result of an honest mistake or intentional, and, if intentional, what the purpose, object, and intention was,—whether it relates to or in any way explains the execution of the mortgage,"—sufficiently protected the rights of the defendant.

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Complaint is made because the court charged the jury as follows:

"Under the law of this State, Isaiah Crossette and his sister Alice Crossette would occupy no different position as creditors than any other creditor of the Isaac Crossette Lumber Company. The fact that they were members and officers of the company did not affect their legal rights in that respect."

This is a correct statement of the law, as defendant seems to concede. He contends that the relation of plaintiff and his sister to the mortgagor called for the utmost good faith on their part, and his complaint really is that the jury were not so charged. The court did charge the jury that, in determining the question of fraud, they should consider, among other things, "the relationship of the parties." Had defendant wished a charge more detailed and explicit, he should have requested it.

We have carefully examined the other assignments of error. None of them are well taken. They, like those discussed, are founded on a misconception, which is removed by a careful examination of the record, or they are fully answered by principles of elementary law.

The judgment is affirmed, with costs.

The other Justices concurred.

ATTORNEY GENERAL, *ex rel.* GARTHE, *v.* CAMPBELL.

ELECTIONS—RECOUNT—IDENTITY OF BALLOTS—FINDING OF JURY.

In a proceeding to try the title to the office of judge of probate, the finding of the jury that the ballots counted by the county canvassers were the same ballots that were voted is conclusive.

Error to Leelanaw; Mayne, J. Submitted December 3, 1902. (Docket No. 143.) Decided December 29, 1902.

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Quo warranto proceedings by Horace M. Oren, attorney general, on the relation of Steiner C. Garthe, against James E. Campbell, to try the title to the office of judge of probate of Leelanaw county. From a judgment for respondent, relator brings error. Affirmed.

Thomas Smurthwaite and *Parm. C. Gilbert* (*O. C. Ransom*, of counsel), for appellant.

Patchin & Crotser and *C. L. Dayton* (*A. F. Bunting*, of counsel), for appellee.

MOORE, J. This case has been here before. It is reported in 130 Mich. 283 (89 N. W. 950). After the opinion was filed, the case was tried before a jury, who returned a verdict in favor of the respondent. The case is brought here by writ of error.

Counsel for relator argue in their briefs some of the questions which were argued by them when the case was here before. We deem it unnecessary to do further in relation to those questions than refer to the opinion before referred to. The remaining questions relate to the recounting of the ballots from the townships of Cleveland, Centerville, Elmwood, and Leland. It was the contention of relator that the ballot-boxes from these townships had been tampered with before the recount, and for that reason the ballots therein should not be recounted. This contention was disputed by respondent. Testimony was given tending to support the respective claims. At the conclusion of the testimony each of the parties requested the judge to direct a verdict in his favor. This request was refused, and the case was submitted to the jury in a full and impartial charge. Among other statements made in the charge were the following:

"If the identical ballots cast by the electors at the election in question were before this board of county canvassers, and were recounted by them, then that recount is final and conclusive. By 'identity of ballots' I mean that they were the same as cast by the electors, that they were

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not changed, but that the board of county canvassers had the same ballots before them as were cast by the people at the election in November.

"It will be necessary for you, then, to determine, and it is the question in this case for you to determine, whether the ballots, as presented to the board of county canvassers to be recounted, and as recounted by them, were the same in identity as those cast by the people at the election,—the same ballots as were counted by the inspectors of election and returned by them to the board of county canvassers.

"The burden of proof is upon the respondent, by a fair preponderance of the evidence, to establish the identity of the ballots recounted by the board of county canvassers. To meet this requirement of the law, he has presented certain evidence covering the time which elapsed from the counting of the ballots by the several township officers constituting the various boards of election inspectors in the several townships of the county, and the depositing of them in the ballot-boxes, until the time they were opened by the board of county canvassers and canvassed by them on the recount. It is for you to determine from the evidence in the case whether this identity has been established.

* * *

"The ballot-boxes must not be opened by any one,—not even through idle curiosity,—and if they were opened by any one, and their contents examined, or even if the ballots were not examined, if it is clearly established to your mind that they were opened, that would constitute such an interference, or such a change of the ballots, as to affect their identity, and they could not be counted by the board of county canvassers on the recount. If the provisions of the statute were strictly complied with, and no question was raised concerning the identity of the ballots, then, in a case of this kind, it would be the duty of the court to charge you that the recount was in all respects final and conclusive. But, in proportion as the statutory requirements are not complied with, the value of the ballots themselves, as evidence of their identity, is decreased.

"In this county there were eleven townships. Concerning seven of them there is no question but that as the count was originally made it was correct. Only four townships are in question: Cleveland, Centerville, Elmwood, and Leland. You will, therefore, confine your deliberations to those four townships. I might say, and it is not disputed, that in the township of Centerville, as recounted,

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the majority for Mr. Campbell was 31. If you should find that the identity of the ballots in the township of Centerville was the same when presented to the board of county canvassers for recount as cast by the people,—that they had not been changed,—then Mr. Campbell is entitled to your verdict. If you should find that the ballot-box in the township of Centerville had been tampered with and the ballots changed, and you should throw that out, and that were the only township that you should find the ballot-boxes tampered with and the ballots changed, and that in the remaining townships the ballots as presented to the board of county canvassers were the identical ballots cast by the people, and that there had been no change, then the respondent, Mr. Campbell, would be entitled to your verdict, even though you rejected the township of Centerville, because he would still have, under the undisputed testimony, a majority of seven. If you find that enough of those ballot-boxes have been tampered with—provided you find any of them were tampered with—to change the results of the board of county canvassers as they found the same, then your verdict would be in favor of Mr. Garthe, the relator, because the original count would stand in each and every township in which you find that the ballot-boxes were tampered with and the ballots changed."

The circuit judge then stated the claims of the parties more in detail, but again told the jury if any box had been opened its contents could not be counted. The court, at the request of counsel for the respondent, submitted the following special questions: (1) Were the ballots counted by the board of county canvassers at the recount the same ballots that were voted in the township of Centerville? (2) Were the ballots counted by the board of county canvassers at the recount the same ballots that were voted in the townships of Elmwood, Leland, and Cleveland? Each of which questions was answered "Yes" by the jury. The issue was quite as favorably presented to the jury as the relator was entitled to have it, and its decision is conclusive.

Judgment is affirmed.

HOOKER, C. J., CARPENTER and MONTGOMERY, JJ., concurred. GRANT, J., did not sit.

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ALLGEMEINER ARBEITER BUND *v.* ADAMSON.

BENEFIT SOCIETIES—CHANGE OF BENEFICIARY.

Where a mutual benefit association, whose constitution provided that a beneficiary might be changed upon a surrender of the certificate, waived such surrender (because the beneficiary, having possession, refused to return it), and, at the request of the member, issued another in its stead for the benefit of another person, the beneficiary in the first certificate, who had made no payments thereon, could not recover from the association upon the death of the member.

Appeal from Bay; Shepard, J. Submitted December 3, 1902. (Docket No. 137.) Decided December 29, 1902.

Bill of interpleader by the Allgemeiner Arbeiter Bund against Emma Adamson and Ursula Merz to determine the right to a death benefit. From a decree for defendant Adamson, defendant Merz appeals. Affirmed.

James H. Davitt, for appellant.

James Van Kleeck, for appellee.

MOORE, J. This is a bill of interpleader. At the time of his death, February 1, 1901, Johann Merz was a member in good standing of complainant bund. By virtue of such membership the person lawfully designated by him became entitled upon his death to a beneficiary fund of $500. Both of the defendants claimed the money; hence this suit. From a decree in favor of defendant Adamson, defendant Merz has appealed.

In December, 1869, Mr. Merz became a member of the local branch of the complainant at Saginaw. Prior to that time he had been married to defendant Merz. These parties lived together until 1897, when they separated,—for what cause does not very clearly appear. At this time there was a division of their property, and Mr. Merz

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went to live with Mrs. Adamson, a daughter by a prior marriage, and continued to live with her up to the time of his death. In December, 1893, the complainant company issued a certificate to Mr. Merz, in which his wife was named as beneficiary. After his separation from his wife he caused a letter to be written to her, to which she sent a reply November 12, 1897, in which she declined to send him what she describes as "the other papers." At the request of Mr. Merz, the complainant society issued to him, November 4, 1897, a new certificate, in which Mrs. Adamson was named as beneficiary. Mrs. Merz retained the prior certificate, but made no payments thereon. Mrs. Adamson not only took care of her father, but, after the certificate was issued in which she was named as beneficiary, made all the payments which were made to the complainant by reason of said insurance. The constitution of the complainant had the following provision in it:

"Each member shall in this certificate name or designate with the full name of the person or persons to whom after his death the money shall be paid. The sum in such certificate shall not be paid to any one else except the one mentioned in the certificate. No certificate shall be assigned or transferable to any one else except the person named in the certificate. But, in case a member wishes to change the name of the beneficiary in his certificate, then he shall ask the president and secretary of his society for another certificate, and shall turn over to them the first one, through which act of his the first one becomes null and void."

It is claimed that, because the first certificate was not surrendered, it is still in force, and Mrs. Merz is entitled to the fund.

Mrs. Merz obtained no vested right as beneficiary that would prevent Mr. Merz from changing the beneficiary named in the certificate. His right to make the change was recognized by the provision of the constitution. Before issuing a new certificate the complainant might insist upon the surrender of the first certificate, if it was in the possession of the assured; but this was a requirement it might

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waive, and this it did when it issued a certificate to Mrs. Adamson, and received payments thereunder. The right of Mr. Merz to change the beneficiary could not be defeated because he did not have the certificate in his possession, and could not surrender it. He undertook to make the change, and the company recognized that he had done so.

It is suggested that, when the second certificate was issued, the person who issued it did not know of the prior certificate. The stub of the certificate book kept by the complainant, and produced on the trial by the secretary, showed the date of and to whom the first certificate was issued, and it cannot properly be said the complainant did not know of the existence of the first certificate when the second was issued. The case is controlled by *Grand Lodge A. O. U. W.* v. *Child*, 70 Mich. 163 (38 N. W. 1); *Same* v. *Noll*, 90 Mich. 37 (51 N. W. 268, 15 L. R. A. 350, 30 Am. St. Rep. 419); *Same* v. *Kohler*, 106 Mich. 121 (63 N. W. 897).

The decree of the court below is affirmed.

The other Justices concurred.

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BRAND *v.* CONNERY.

1. MECHANICS' LIENS—DECREE—BILL IN AID OF EXECUTION—RES JUDICATA.

   A consent decree, dismissing a bill to enforce a mechanic's lien as to the owner of the land, is not a bar to a judgment creditor's bill or a bill in aid of an execution issued on the same decree against the owner's husband, who had furnished a large portion of the money for the building.

2. SAME—IMPROVEMENTS ON WIFE'S PROPERTY.

   Where a man becomes insolvent by improving his wife's property with her knowledge and consent, a subcontractor who has furnished the husband with material for the improvements can maintain a bill in aid of an execution levied on the land, as well as a judgment creditor's bill.

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Appeal from Saginaw; Beach, J. Submitted December 4, 1902. (Docket No. 50.) Decided December 29, 1902.

Creditor's bill and bill in aid of execution by John F. Brand and Clarence H. Brand, executors of the last will and testament of Daniel Hardin, deceased, against James A. Connery and Christiana Connery. From a decree dismissing the bill, complainants appeal. Reversed.

In the fall of 1896 defendant James A. Connery made a contract with Boergert & Son to furnish the materials and do the carpenter work on a brick building he was erecting in East Saginaw. Boergert & Son made a contract with D. Hardin & Co. to furnish the door and window frames and cornice for the outside of the building and the entire inside finish of the building. The materials for the outside were furnished in the winter and early spring of 1897, and some time in May complainant began the delivery of the inside finish, which amounted to about $750. D. Hardin & Co. were paid about all the work and material amounted to for the work on the outside, leaving the inside finish alone unpaid. In May, 1897, Devillo Dennison, who had general charge of the business of D. Hardin & Co., learned that Boergert & Son were not responsible, and, before delivering any inside finish, informed Mr. Connery that they would not deliver any of the material for said inside finish without pay therefor upon delivery, unless he (Connery) would agree to pay for it, which Dennison testifies he did agree to do, but Connery denied, both in his answer and upon the stand, claiming that he only agreed to assist them in getting their pay, and did notify them every time he paid Boergert & Son any money. While the work was in progress Mr. Connery gave his note for $500, afterwards paid $100 on it, and renewed the note for the balance. Later he gave his note for the balance due on the contract, of $348.76. He has paid neither of those sums.

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D. Hardin & Co., before the 60 days had elapsed from the date of furnishing the last material, filed their lien on the property, and served a notice thereof, with a copy of their account, upon said Connery. When they commenced to enforce their lien, they learned that the land belonged to Mr. Connery's wife. Said lien suit terminated in a consent decree against said Connery and Boergert & Son for the sum of $888.85 in favor of complainant, and a decree in favor of Mrs. Connery, declaring her land freed from all claim under the mechanic's lien. Later an execution was issued against said James A. Connery and Boergert & Son, which was returned wholly unsatisfied. An *alias* execution was issued later, and levied upon the real estate upon which complainant's building materials were used, viz., lot 7 in block 17 of Hoyt's plat of East Saginaw, in Saginaw county, Mich., and this bill was filed in aid of such execution and also as a judgment creditor's bill. The lot itself was not worth over $1,000, and was entirely unproductive. After the erection of said building it was worth $10,000; and, while defendants occupy one-third as a homestead, the remaining two-thirds yields a gross income of $900 per year. The entire expense of the building was defrayed from the means of Mr. Connery, except $2,500, borrowed on the property, $2,000 of which yet remains a lien on the land.

Albert Trask (*Weadock & Purcell*, of counsel), for complainants.

James H. Davitt, for defendants.

GRANT, J. (*after stating the facts*). 1. We are of the opinion that the decree in the other suit, entered by stipulation, is no bar to the present one. The sole purpose of that suit was to enforce the lien provided by the statute. The solicitors agreed that such lien could not be enforced against Mrs. Connery, and therefore consented to a decree dismissing the bill as to her and to a personal decree against Mr. Connery. There was nothing in the plead-

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ings in that suit or in the decree touching the rights of creditors of Mr. Connery to proceed by a bill in aid of execution or by judgment creditor's bill.

2. Mr. Connery had no creditors at the time he made contracts for the erection of this building upon his wife's land. The only facts from which any intent to defraud either Boergert & Son or those who furnished the materials are that Mr. Connery made the contracts in his own name; that his wife knew it; that she furnished no funds; that Mr. Connery did not inform those with whom he contracted that he was not the owner of the building, but did in fact by his conduct treat it as his own, and to this conduct she by her silence assented. It is true that those with whom he was dealing might have ascertained, by examination of the records in the office of the register of deeds, that the record title was in his wife. But even prudent merchants are not always thus careful. We think that complainant had a right to believe that Mr. Connery was the owner of the land, and to deal with him as such. He expended all his means in the erection of the building. By so doing he became insolvent, and had not sufficient left to pay the claim of D. Hardin & Co. The question, therefore, is, Can a person, out of debt and solvent, expend all his means in improving his wife's property, and thus become insolvent, and leave creditors, who have trusted him for materials to be used in such improvements, without redress? Have such creditors a right by suit in chancery to pursue the property of their debtor, which, with the knowledge and consent of his wife, he has expended in improvements upon her property? Counsel have evidently made diligent search, and find no case directly in point. We also are unable to find any authorities decisive of the question, and must, therefore, decide it upon principle.

The case is not within those where there were existing creditors; nor do we think it within the case of *Cole* v. *Brown*, 114 Mich. 396 (72 N. W. 247, 68 Am. St. Rep. 491), and authorities there cited, holding that, where there

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are no existing creditors, the voluntary conveyance of property by a husband to his wife is valid, unless conveyed for the express purpose of defrauding subsequent creditors. It is well established that an existing creditor may follow the improvements made by an insolvent debtor to the premises upon which they have been made by the consent of the wife, and that he has a lien upon them for his debt. *Rose* v. *Brown*, 11 W. Va. 122, 137, and *New South Bldg. & Loan Ass'n* v. *Reed*, 96 Va. 345 (31 S. E. 514), and authorities there cited. In all the cases cited by counsel for complainants in which the courts have allowed creditors to follow such improvements the debtor was, at the time of making the improvements, insolvent. Such are the cases of *Lathrop* v. *Gilbert*, 10 N. J. Eq. 344; *Kirby* v. *Bruns*, 45 Mo. 234 (100 Am. Dec. 376); *Newcomb* v. *Phillips*, (Ky.) 9 S. W. 529; *Burt* v. *Timmons*, 29 W. Va. 444 (2 S. E. 780, 6 Am. St. Rep. 664); *Trefethen* v. *Lynam*, 90 Me. 376 (38 Atl. 335, 38 L. R. A. 190, 60 Am. St. Rep. 271).

Mrs. Connery stood by and permitted her husband to enter into contracts enhancing the value of her property many times. She is several times richer than before. She has received the benefit of all her husband's property, and as well the property of complainants to the value of $888.85. Boergert & Son have not received the amount due them from Mr. Connery by about a like sum. This is not a case where a husband has made an absolute transfer of property to his wife, and has afterwards entered into business, contracted debts, and become insolvent. He had transferred nothing to her when his contract with Boergert & Son was made. He had not agreed with her to do so. So far as she was concerned, he might have stopped work at any time, and removed the unused material. The transfer to her was complete only as the work was done, and after the material used had become a part of the realty. Until then it was his, and subject to levy for his debts. He had become insolvent when D. Hardin & Co. furnished the material. She knew that he was

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erecting this building as though it were his, though he was in fact erecting it for her. Both are occupying a part of it as a homestead, and living upon the income derived from the other. Both are thus enjoying the benefit of the identical property which was erected in part at the expense of his creditors. The transaction is abhorrent to equity and good conscience. Equity stamps it as fraudulent in fact, though not in intent, and will extend its arm to accomplish justice. The original interest of the wife will be protected.

The decree is reversed, and decree entered for complainants, with costs of both courts.

The other Justices concurred.

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BURKHARDT v. JAMES WALKER & SON.

1. HOMESTEAD—REMOVAL OF CLOUD BY WIFE.
   A wife may maintain a bill in equity to set aside a levy on and sale of her husband's homestead on execution.

2. SAME—ABANDONMENT.
   A temporary removal from a homestead, with the intention of a speedy return, does not constitute an abandonment.

3. SAME.
   A conveyance of a homestead by a husband and wife to a third person, who at once conveys to the wife, being for the purpose of placing the title in the wife, does not constitute an abandonment.

4. SAME—SALE OF FEE ON EXECUTION.
   The fee in land occupied as a homestead cannot be sold on an execution against the owner.

Appeal from Macomb; Tucker, J. Submitted December 5, 1902. (Docket No. 148.) Decided December 29, 1902.

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Bill by Minnie Burkhardt against James Walker & Son, a corporation, to set aside an execution levy and sale. From a decree for complainant, defendant appeals. Affirmed.

Byron R. Erskine, for complainant.

William S. Jenney, for defendant.

CARPENTER, J. This is a suit in chancery to set aside an execution levy on, and sale thereunder of, a house and lot in Mt. Clemens. The execution issued upon a judgment in favor of defendant, and against complainant's husband. At the time of the levy the property in question was occupied as a homestead by complainant and her husband. The title stood in his name, and it was worth less than $1,500. Subsequently, and before the sale under the levy, complainant's husband absconded, leaving complainant in a destitute condition. To procure means for her and her child's support, complainant (with the intention of speedily returning, and with no intention of waiving her homestead rights) rented the premises in controversy from month to month, reserving only the use of a back room for the purpose of storing her furniture. A couple of months later, and three days before defendant commenced to advertise for the sale under its execution, complainant and her husband conveyed the property in question to one W. J. Dusse, who at once reconveyed the same to complainant. The court below gave complainant a decree. Defendant appeals, claiming that the decree should be reversed, because:

1. Complainant has no right to resort to equity for redress.
2. By moving from and renting the property, and uniting with her husband in the conveyance to Dusse, complainant lost her homestead interest.
3. The levy and sale should be allowed to stand, subject to the homstead rights of complainant.

In answer to defendant's first claim, it is sufficient to

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refer to *Lozo* v. *Sutherland*, 38 Mich. 168, *Myers* v. *Weaver*, 101 Mich. 477 (59 N. W. 810), and *Hitchcock* v. *Misner*, 111 Mich. 180 (69 N. W. 226), which hold that equity has jurisdiction to remove a levy upon and execution sale of a homestead, and *Armitage* v. *Toll*, 64 Mich. 412 (31 N. W. 408), which holds that "it is as much the right of the wife, either at law or in equity, to protect the homestead rights of herself and family, as it is that of the husband."

It is a sufficient answer to defendant's second claim to say that a temporary removal, with the intention of a speedy return, does not constitute an abandonment (*Bunker* v. *Paquette*, 37 Mich. 79; *Kaeding* v. *Joachimsthal*, 98 Mich. 78 [56 N. W. 1101]; *Hitchcock* v. *Misner*, 111 Mich. 180 [69 N. W. 226]), and that the conveyance to Dusse was for the purpose of placing the title in complainant.

In support of the third claim for reversal, defendant says:

"The complainant's homestead right, by virtue of being the wife of the execution defendant, was simply a contingent right of occupancy, not an interest in the fee. * * * The fee of the execution defendant, subject to the homestead rights of the wife, * * * and other incumbrances, can be sold on execution. * * * *Showers* v. *Robinson*, 43 Mich. 502 (5 N. W. 988); *Drake* v. *Kinsell*, 38 Mich. 232."

The most that can be claimed for these cases is that they establish the proposition that an administrator's sale, under an order of the probate court, of the homestead of the family of his intestate, subject to their homestead rights, is valid, if the order authorizing such sale is not appealed from. The case at bar is not ruled by these authorities, but it is ruled by *Lozo* v. *Sutherland*, *Myers* v. *Weaver*, and *Hitchcock* v. *Misner*, above cited, which hold, in effect, that while property is a homestead there is no interest which can be taken and sold under an execution against the owner.

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It follows that the decree of the court below must be affirmed, with costs.

The other Justices concurred.

STOCK *v.* TOWNSHIP OF JEFFERSON.

1. CONTEMPTS—ACTS OF STRANGERS.
   Acts done by strangers, without the privity or consent of a party, do not make him guilty of contempt.

2. SAME—INJUNCTION—DIVERTING WATER.
   In this case, a decree enjoining defendant from diverting water from a lake, and requiring him to fill up a ditch, is examined, and it is *held* that it should not be so construed as to render him liable for contempt because strangers, without his knowledge, tore away dams he had built to fill up the ditch.

Appeal from Jackson; Peck, J. Submitted December 5, 1902. (Docket No. 25.) Decided December 29, 1902.

Contempt proceedings by Frederick W. Stock against the township of Jefferson and George E. Porter. From a judgment against defendant Porter, he appeals. Reversed.

Frankhauser & Cornell, for petitioner.

F. H. Stone and *F. A. Lyon*, for appellant.

MONTGOMERY, J. The original bill in this case was filed for the purpose of obtaining a decree enjoining the defendants from diverting water from Lake Pleasant through an artificial ditch or canal. Complainant's rights were declared in the decree, and the defendants were enjoined as prayed. This decree was, on appeal, affirmed by this court. 114 Mich. 357 (72 N. W. 132). The present proceeding was instituted by petition in the same case in the circuit court, in chancery, alleging that de-

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fendants are guilty of contempt in failing to observe the injunction. On the hearing below, it was conceded that no punishment could be administered to the defendant township, but the circuit judge found the defendant Porter guilty of contempt, and imposed upon him a fine of $50. From this order the defendant Porter has appealed.

The case was determined below on the decree, and proofs offered bearing upon the question of its performance. The decree contained the following provisions:

"It is therefore ordered, adjudged, decreed, and commanded that said defendant George E. Porter and the said defendant the township of Jefferson, by its officers and agents, be, and they are hereby, perpetually enjoined and restrained from further diverting said water as aforesaid through said big ditch or canal, or any ditch now dug or to be dug, away from the natural course said waters take, as charged in said bill of complaint, and the course heretofore found by this court to be the natural course of said waters, and that they be perpetually enjoined from any and all attempts and schemes to divert said water from discharging itself by way of the St. Joseph river to Lake Michigan, and from meddling with the headwaters of said river so as to obstruct or divert the same from its natural outlet.

"It is further ordered, adjudged, and decreed and commanded that said defendant George E. Porter, personally, and the township of Jefferson, by its officers and agents, fill up said big ditch, or cause the same to be done, on or before the 1st day of November, 1896, at the following points and to the following depths, viz.: That the big ditch be filled up with earth or other substance where it crosses the highway running nearly northerly and southerly just east of said Court Walters', in said township, so it shall completely stop the flow of water through the same, occasioned by the defendants deepening and widening the said ditch in the years 1893 and 1894, and that the same be filled up at said last-mentioned point from the bottom of said ditch until the top of said filling shall be on a level with the top of a filling in said ditch five feet high from the bottom, in case the same were so filled at the highest point in said ditch between said highway and where it strikes the marsh west of said highway; in other

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words, that the top of said filling shall be as high as the filling would be if said ditch were filled five feet high from the bottom thereof at the highest point between the said highway and the marsh west thereof.

"And it is further ordered, adjudged, decreed, and commanded that said ditch be filled up so as to stop all flow of water occasioned by the deepening and widening of the same by said defendants in the years 1893 and 1894 at the point known as the junction where the waters leave the old channel between McCollum Lake and Pleasant Lake and flow towards the northeast; the same to be filled up until the top of said filling at said last-mentioned point shall be ten inches above the bottom of said old channel, running from said Lake Pleasant to said Lake McCollum, from which channel said waters were diverted. In short, it is ordered that at each of said fillings, hereinbefore mentioned, said ditch shall be filled up so as to place the respective parties *in statu quo*."

The circuit judge filed a special finding of facts, the salient features of which may be concisely stated as follows: The defendant Porter did in fact fill up the ditch in the two places directed specifically by the decree. These dams, as constructed by the defendant, stopped the flow of water through the canal, and the diversion of water thereupon ceased, and such dams, had they been left undisturbed, would have accomplished all the purposes of the decree; but, shortly after the dams were constructed, they were removed by some person or persons unknown. The circuit judge was unable to find from the testimony that either of the defendants had anything to do with the tearing out of the dams, or that either was directly or indirectly connected therewith, or had any knowledge when they were constructed that they would be torn out by others. The view upon which the circuit judge proceeded was that notwithstanding the defendant had complied with the specific directions for interrupting the flow of water, and notwithstanding the means adopted were adequate to the purpose, yet the decree enjoined upon the defendant a continuing duty to see to it that the waters should not be diverted at any time in the future, and that,

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as a corollary, those who trespassed by removing the dams offended against the *defendant*, and interfered with *him* in the performance of his duty, but did not excuse his full performance.

We cannot assent to those conclusions. In its legal aspect, the case is not different than it would have been had the interference from outside sources occurred many years after the steps which the decree contemplated had been taken. If it is correct to say that the obligation of defendants was continuous, and was to *prevent* the diversion of water from this lake for all time, rather than to *refrain* from themselves diverting it, it would follow that, while entirely innocent of any purpose to evade the decree of the court, the defendants might, at any time in the day or night, be placed in contempt by the tortious act of a stranger. The decree should not be so construed. The case is no exception to the rule that a defendant is not punishable for acts done by strangers without his privity or consent. See 2 High, Inj. §§ 1440, 1443.

The order will be reversed, with costs of this court to defendant. No costs will be awarded against complainant for the proceedings below.

The other Justices concurred.

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ADAMS *v.* ELSEFFER.

1. EVIDENCE OF CHARACTER.
   In an action to recover money misappropriated by a clerk, testimony as to his good character is inadmissible.
2. TRIAL—EXPLANATION BY WITNESS.
   A witness, who testified that he knew of defendant's defalcation two years before he informed plaintiff, should have been permitted to explain why he withheld the information.
3. EMBEZZLEMENT—EVIDENCE—DAMAGES.
   In an action against a clerk to recover for money embezzled, evidence, in addition to proof of specific items taken, that, during the year preceding the last act of defalcation, the profits of the business were largely reduced, although the sales were larger at the same advance over cost, and the expense of the business less, together with testimony that defendant had expended and accumulated sums largely in excess of her income, made it a question for the jury to determine whether a larger sum was embezzled than the specific items proven.

Error to Saginaw; Beach, J. Submitted December 5, 1902. (Docket No. 116.) Decided December 29, 1902.

Assumpsit by James A. Adams against Florence H. Elseffer for money had and received. From a judgment for defendant, plaintiff brings error. Reversed.

John M. Brooks (*George W. Weadock*, of counsel), for appellant.

Eugene Wilber (*Humphrey & Grant*, of counsel), for appellee.

MONTGOMERY, J. This is an action of *assumpsit*. The plaintiff has for several years been engaged in the retail shoe business at the city of Saginaw. From 1895 until August 17, 1901, the defendant was his cashier and

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bookkeeper. On that date the plaintiff, as the testimony offered on his behalf tends to show, discovered that defendant was appropriating money received from sales of goods to her own use, and falsifying the accounts by failing to enter the amounts upon the books. The plaintiff also offered testimony tending to show by one Erhart, a clerk of the plaintiff, that some two years previous he had become suspicious that defendant was misappropriating money, and that for a time he kept watch over her, and accumulated some evidence, which he entered in minutes taken at the time, but which for some reason he failed to disclose to the plaintiff. The alleged misappropriation of money was met by positive denial by the defendant, and she also offered in her defense evidence of her good character. The circuit judge, at the conclusion of the plaintiff's case, withdrew from the consideration of the jury any claim for moneys misappropriated except the specific items which were claimed to have been appropriated on the 17th of August, and on the previous occasions of which the plaintiff's witness Erhart kept an account. The jury returned a verdict for defendant, and the plaintiff brings error.

The questions presented are sufficiently indicated by the foregoing statement. Perhaps the most important one is whether the court erred in admitting testimony of character. It is quite apparent from the record that the testimony as to character was not intended to be confined to mere proof of reputation, but the purpose, apparently, was to get an expression from those who had previous dealings with the defendant of their opinion as to her probity. Whether the assignment of error raises this precise question may be doubtful, but, in the view we take of the general subject, it becomes unimportant. The question is presented as to whether evidence of character is admissible in a civil case, wherever the nature of the action is such that the evidence to sustain it involves the imputation of moral turpitude to the defendant. The general rule undoubtedly is, as stated in 1 Whart. Ev. § 47, that

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in civil actions the character of either party is, as a rule, irrelevant. See, also, 5 Am. & Eng. Enc. Law (2d Ed.), p. 861. The correct rule, according to the great weight of authority, is that in civil actions the character of a party to the action may become the subject of proof in case, and only in case, it is involved in the issue. And we think the character is involved in the issue only in the cases in which either the right of recovery or the extent of recovery is affected by the character of either the plaintiff or the defendant. *Anderson's Ex'rs* v. *Long*, 10 Serg. & R. 55. It is true that there are cases which extend the rule further. And Mr. Greenleaf, in paragraph 54, vol. 1, states the rule more broadly, as follows:

"And generally, in actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it."

This text is criticised by Mr. Wharton, and it is shown that it rests upon *Ruan* v. *Perry*, 3 Caines, 120, the doctrine of which was later repudiated in *Gough* v. *St. John*, 16 Wend. 646; *Pratt* v. *Andrews*, 4 Comst. 493; *Porter* v. *Seiler*, 23 Pa. St. 424 (62 Am. Dec. 341). Referring to *Ruan* v. *Perry*, Mr. Justice CHAMPLIN, in *Fahey* v. *Crotty*, 63 Mich. 383 (29 N. W. 876, 6 Am. St. Rep. 305), said:

"In the State of New York such evidence was at one time received in civil suits [citing *Ruan* v. *Perry*], but that case has been reviewed and overruled in later cases, and the English rule adhered to, as stated by the text-writers on Evidence."

In the same case of *Fahey* v. *Crotty*, Mr. Justice CHAMPLIN also said:

"In civil actions, with the exception of those cases where by the pleadings the character of the party is put in issue, the weight of authority is against the admissibility of such testimony to rebut imputations of misconduct or fraud."

We have met with no clearer exposition of the law upon

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the subject than is found in *Simpson* v. *Westenberger*, 28 Kan. 756 (42 Am. Rep. 195). See, also, *Lander* v. *Seaver*, 32 Vt. 114 (76 Am. Dec. 156); *Wright* v. *McKee*, 37 Vt. 161; *Home Lumber Co.* v. *Hartman*, 45 Mo. App. 647; *Vawter* v. *Hultz*, 112 Mo. 633 (20 S. W. 689); *Gebhart* v. *Burkett*, 57 Ind. 378 (26 Am. Rep. 61); *Norris* v. *Stewart's Heirs*, 105 N. C. 455 (10 S. E. 912, 18 Am. St. Rep. 917). See, also, article by Elisha Greenhood in 16 Cent. Law J. 202, where the authorities are collated. In our view, the testimony offered was inadmissible.

The plaintiff called as a witness Mr. Erhart, who testified that he acquired knowledge of the defendant's defalcation some two years before he divulged it to the plaintiff. He was asked to state why he withheld this information, and the court ruled out the testimony. We think it was competent for the plaintiff to rebut the inference which would arise from such concealment of the fact by permitting the witness to explain.

In view of a new trial, it becomes important to determine if there was any testimony to go to the jury upon the question of whether a larger sum than the specific items mentioned was taken by the defendant. The testimony on behalf of plaintiff was this: That, during the year preceding her last defalcation, the profits of the business were reduced very largely, and this notwithstanding the fact that the sales were larger than the preceding year, and the expense of running the business was less than the preceding year. The only fault in this testimony, if any, was that the evidence may have failed to show specifically that the goods in which the plaintiff dealt were sold at substantially the same advance over cost during the last year as during the preceding year. If this were clear, it would be some evidence, at least, that the plaintiff lost by defalcation, or in some other unexplained manner, a considerable sum of money during this period. The evidence further tended to show that the defendant, when she entered the employ of the plaintiff, lived with her mother; that their only source of income, aside from

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defendant's earnings, was the rental of two small houses or apartments belonging to her mother, amounting in the aggregate to from $18 to $22 per month, and certain gifts which came to defendant, the exact amount of which does not conclusively appear by the record; that, when she entered plaintiff's employ, her mother and herself had allowed the taxes to accumulate upon the property to the amount of $228, or thereabouts, and that, for the purpose of paying off the taxes, they had placed a mortgage upon the property for some $350; that thereafter, and while in the employ of the plaintiff, this mortgage, principal and interest, was paid off, taxes were kept up on the property, real estate was bought at a price of $225, and when defendant left plaintiff's employ she had $260 in the bank. It appears further that during this time the mother and daughter, and during a part of the time a nephew of the defendant, lived upon an income, as the testimony of the plaintiff tended to show, of something like $7 per week. While this may not be impossible, yet, in view of the fact that the defendant was unable to state, and did not attempt to state, some of the items of her expense of living, we think that, should it appear clearly that the plaintiff suffered a loss in excess of the specific items proven, upon a record showing the defendant's financial condition substantially as it appeared upon this trial, it would be the duty of the court to submit the question to the jury as to the amount which defendant embezzled. A case determined by this court upon facts somewhat resembling the present case is *Warren* v. *Holbrook*, 95 Mich. 185 (54 N. W. 712, 35 Am. St. Rep. 554).

The judgment will be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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GARY v. EATON CIRCUIT JUDGE.

PLEADING—BILL OF PARTICULARS—DISCRETION OF JUDGE—TORTS.

In an action of criminal conversation, a circuit judge may, in his discretion, require the plaintiff, whose declaration is general, to furnish a bill of particulars, specifying the particular place and date of each alleged act of intercourse.

Mandamus by Fanny Gary to compel Clement Smith, circuit judge of Eaton county, to vacate an order requiring relator to furnish a bill of particulars. Submitted December 16, 1902. (Calendar No. 19,670.) Writ denied December 29, 1902.

In an action of *crim. con.*, brought by the relator against one Pearl Darling, the court made an order directing her to furnish a bill of particulars. The declaration contains four counts. Each count alleges that on a certain day, "and on divers other days between that date and the commencement of suit, to wit, at the city of Eaton Rapids, in said county, to wit, at the township of Hamlin, in said county, the defendant had illicit carnal intercourse with plaintiff's husband." The order required the plaintiff to furnish a bill of particulars, specifying the particular place and time and the date of each of the alleged acts of intercourse and clandestine meetings of which plaintiff intended to give evidence, and upon which she intended to rely. Relator insists that the court had no power to order a bill of particulars, and asks the writ of *mandamus* to compel him to vacate the order.

J. M. & J. L. Powers, for relator.

J. M. C. Smith and *John M. Corbin*, for respondent.

GRANT, J. (*after stating the facts*). Bills of particulars in actions of tort do not rest upon any strict legal

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right. They rest in the sound discretion of the trial court, to be required or refused, according as justice and fair dealing require. The declaration in this case is general, fixing neither time nor place. The charge is a serious one. Plaintiff has charged acts of sexual intercourse and clandestine meetings. If she, when planting her suit and making these charges, was unable to fix time and place, then her suit would become a dragnet, and the defendant compelled to meet any act which plaintiff might fish up in this process against her. When specific acts of this character are charged, it is but justice to the party against whom they are charged that he be furnished with time and place of the alleged acts, so he may be able to prepare to meet them upon the trial. This practice at the common law is thoroughly discussed by Chief Justice Shaw, in *Com.* v. *Snelling*, 15 Pick. 321. *Tilton* v. *Beecher*, 59 N. Y. 176 (17 Am. Rep. 337), was an action of *crim. con.* The trial court declined to require a bill of particulars, on the ground that it did not possess the power to do so. The court of appeals reversed the decision, holding that it rested in the sound discretion of the trial court, and remanded the case, with direction to the court below to exercise its discretion upon the merits. The practice is there thoroughly examined and the authorities cited. They fully sustain the respondent in making the order.

The writ is denied.

The other Justices concurred.

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JANUARY TERM, 1903.

PREUSCHOFF *v.* B. STROH BREWING CO.[1]

1. WITNESSES—CREDIBILITY.
   The jury are not bound to believe a witness whose testimony on direct examination not only differs from that on cross-examination, but is also inconsistent with the circumstances, although there is no other testimony bearing on the same question.

2. NEGLIGENCE—NOTICE—QUESTION FOR JURY.
   The presence of a carpenter in a doorway, removing the door, is not notice to a fellow employé that a platform and stairway inside the door have been removed, so as to make him negligent, as a matter of law, in not heeding the warning. GRANT, J., dissenting.

Error to Wayne; Brooke, J. Submitted October 9, 1902. (Docket No. 7.) Decided January 6, 1903.

Case by August C. Preuschoff, administrator of the estate of Conrad H. Huber, deceased, against the B. Stroh Brewing Company, for the alleged negligent killing of plaintiff's intestate. From a judgment for plaintiff, defendant brings error. Affirmed.

Defendant's brewery is situated between Elizabeth and Columbia streets, in the city of Detroit. These streets run east and west, Elizabeth street being on the south. Elizabeth street proper extends only to that one of the defendant's buildings which constitutes its cellars and shipping rooms, but is continued east by an alley known as "Elizabeth-Street Alley," upon which this building abuts. The cellars are on the west and the shipping rooms upon the east; the large shipping room being upon the north end of the building, the small one upon the south.

[1] Rehearing denied March 23, 1903.

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A driveway extends from the end of Elizabeth street to the north on the west side of this building to the yard upon the north, in which yard are situated defendant's barns and shed. The entrance to the small shipping room from the alley is through a door 2 feet 10 inches in width, swinging in and to the left. The sill is 4 inches higher than the alley pavement. A small platform, 6 inches higher than the sill and 2½ or 3 feet square, is situated inside the door. At the end of this platform is a closed stairway leading into the cellar, and directly in front of the door, while at the right there are steps leading to the floor of the small shipping room, which is 3 to 4 feet higher than the alley pavement. Beer was loaded onto the peddlers' wagons from this floor through an opening next to the door. A stairway leads to the room above directly over the cellar stairway. Beer for city trade was loaded at the small shipping room; that for outside trade from the large shipping room.

Mr. Huber, the deceased, was a driver of one of defendant's city delivery wagons. He received orders from the shipping clerks at the office. When there were no orders to be filled, it was the duty of Mr. Huber to report to the barn. The defendant had arranged with a certain company to put three large cast iron casks into the cellar. These casks were in sections 8 feet in diameter and 30 inches wide, with three sections to each cask. Each cask had two rims. This company had hauled the evening before, and placed near the door in Elizabeth-street alley, one or more of the sections. The other sections and rims were drawn in the morning, and deposited around the door. They obstructed the alley so that no team could pass through.

The deceased and another driver had taken out loads from the small shipping room in the morning before the alley was thus obstructed, in accordance with orders received from one Schrantz, a shipping clerk. Stempel, the other driver, loaded first. The day was stormy, and, after delivering his load, Mr. Huber returned, put his

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horse under the shed, went to the office, asked for orders, but there were none just then for him to fill. Meanwhile Mr. Stempel had returned from delivering his first load, drove into the alley for another load, found it obstructed, the door nailed up, the stairs being removed, and then turned around and drove through the driveway to the platform of the large shipping room to obtain his load. On his way he met Mr. Huber. Mr. Stempel testified that Mr. Huber asked him what the matter was, and if he was not going to take the other orders out; that he (Stempel) told Mr. Huber that he could not load there; that they had taken the stairway away "to load casks down." A large truck was standing at the platform, and Stempel asked Huber to help push it away so that he could get his load there. This he did. Mr. Stempel loaded and drove away. From this time until Mr. Huber went to the door of the small shipping room and fell down the stairway no one saw him. Mr. Stempel's testimony as to Mr. Huber's assisting him to remove the large truck is corroborated by another teamster named Baxter.

Meanwhile one Lewis, an employé of the company which had contracted to put in the casks, came, with other employés of said company, to the alley to do the work. The casks and rims, 15 in number, lay in the alley in front of the door. One Burmeister, a carpenter in the employ of the defendant, was there to assist in the work, which was evidently under the direction of Mr. Lewis. While Mr. Burmeister was taking out the platform and the stairs, the door was fastened by one nail driven into the casing. It took from a half to three-quarters of an hour to remove the stairway and platform. After this was done, the nail was taken out, the door swung in, and Mr. Burmeister stood in the doorway with his back to the alley, reaching to the upper hinge with a screwdriver, removing the screws for the purpose of taking down the door. It was necessary to remove the door and also tear down the platform in order to obtain the proper width to admit the sections of the casks. While Mr. Burmeister

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was engaged in this work, Mr. Lewis was arranging his tackle overhead for the purpose of lowering the casks. Mr. Burmeister was a large man, 5 ft. 5 in. high; weight, 195 pounds, breadth of shoulders, 20 inches, breadth of hips, 15½ inches. While Mr. Burmeister stood in the position above described, and Mr. Lewis was at work fixing the tackle, Mr. Huber, without warning, approached the door, pushed Mr. Burmeister aside so that he had to grasp the casing to prevent being thrown into the cellar himself, fell into the cellar, and was killed. Plaintiff seeks to recover damages for his death on account of the negligence of the defendant in leaving the doorway unguarded. The circuit judge left the question to the jury, who found a verdict for the plaintiff.

Brennan, Donnelly & Van De Mark, for appellant.

Ira A. Lieghley, for appellee.

GRANT, J. (*after stating the facts; dissenting*). 1. The court instructed the jury:

"I charge you as a matter of law that you may believe the testimony of any witness or disregard the testimony of any witness."

This instruction was given without any qualification or explanation. It is not the law. Jurors are not at liberty to arbitrarily set aside the testimony of a fair and unimpeached witness. The books are full of cases where courts have directed verdicts where the testimony is uncontradicted, and the witnesses, though in the employ of the parties, are unimpeached. There must be something apparent upon the record to cast discredit upon the testimony of an uncontradicted witness before the jury are justified in disregarding his testimony. *Underhill* v. *Railway Co.*, 81 Mich. 43 (45 N. W. 508); *Fruit Dispatch Co.* v. *Russo*, 125 Mich. 306 (84 N. W. 308), and authorities there cited; *Michigan Pipe Co.* v. *Michigan Fire & Marine Ins. Co.*, 92 Mich. 482 (52 N. W. 1070,

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20 L. R. A. 277). The decisions of other courts are to the same effect. *Evans* v. *George*, 80 Ill. 53; *Harding* v. *Brooks*, 5 Pick. 244; *Berzevizy* v. *Railroad Co.*, 19 App. Div. 309 (46 N. Y. Supp. 27).

The facts set forth in the above statement are undenied by a single witness, or by any circumstances in the case. The only ground a jury could have for setting aside the uncontradicted testimony of Stempel is that on cross-examination he testified that he had not talked with the defendant's attorneys about the facts he testified to. When his attention was called upon redirect examination to conversations with defendant's attorneys, he promptly admitted them. On recross-examination he explained that he supposed counsel for the plaintiff was referring to conversations before he was subpœnaed. Plaintiff's counsel on cross-examination also elicited from witness the fact that he at the time of the accident told others that he had so told Huber. The inquiry by Mr. Huber was natural, and Mr. Stempel's reply was equally natural. Whether, under the circumstances, this denial of the witness that he had talked with the defendant's counsel was sufficient to authorize the jury to wholly disregard his testimony, corroborated as it was in other particulars, is not specifically argued by counsel, and I express no opinion upon it. It was at least important for the court to instruct the jury that, before they could utterly disregard his testimony, they must be able to find that this denial was sufficient to destroy confidence in the truthfulness of the witness.

2. I think the plaintiff failed to make out a case of negligence. In addition to the facts already stated, the opening for taking out beer at the right of the door was eight feet long and six to seven feet high. It was partly raised. The only testimony upon this point is that "it was about half to a quarter open; about half, or a little lower." Two gaslights were burning in the cellar, one near the foot of the stairs, the other farther in. A light was also burning in the small shipping room. There was a small window in the transom over the door. Three men

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were employed in and around the doorway to put the casks into the cellar. One of these stood in the doorway in the act of removing the door; another was inside on the stairs over the door, arranging the tackle; and the third was just inside the doorway upon the shipping room floor. About two years before, other casks had been lowered into this cellar at the same place and in the same way, the door, stairs, and platform being removed. Mr. Huber was then in the employ of the company.

The defendant's employés acted with commendable care in nailing up the door while removing the stairs. It was then necessary to remove the door. The door could not be obstructed; the space must be left open. A rail outside of the casks would have been no warning or protection, unless built high enough to keep persons out. Ordinarily, no one could enter this door in the usual and proper manner without being seen by some one of the defendant's employés. Was it the legal duty of the defendant to suppose that one of its employés would rudely push another employé, who stood in the doorway, aside, and rush to his death? Burmeister was there for two purposes,—to keep defendant's employés out, and to assist in the work. If he had been placed there for the sole purpose of notifying those who had occasion to go there of the danger, and he stood with his back to the alley, obstructing the doorway so that no one could enter without pushing him aside, would not defendant have performed its duty towards its employés? Would not Mr. Burmeister have been justified in believing that no one would attempt to push him aside and rush into the building? Burmeister's speedy action in grasping hold of the casing alone saved him from going into the cellar with the deceased.

Why Mr. Huber entered does not appear. He was not going after a load. It does not appear that he had occasion to go there for any other purpose. It evidently was not the usual place for employés to stay when not at work. His proper place, when not engaged in hauling beer, was at the barn. His team was at the time in the

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shed near the barn. He had no work to perform in the shipping room at this time. Had Mr. Huber entered this doorway in a proper manner, he would not have been injured. He could not enter until Mr. Burmeister was out of his way. Instead of asking him to step aside, he rudely pushed him aside. He had no right to do this. There is no dispute as to the fact upon this point. Both Burmeister and Lewis testified that Huber, without saying a word, deliberately and forcibly pushed Burmeister aside, and their testimony is uncontradicted. I think that the defendant was under no obligation to anticipate such action on the part of its employés, that it had done all that the law requires to protect them, that the surroundings were sufficient to put Mr. Huber upon his guard, that he entered this door in an unjustifiable manner, and that the accident was the result of his own rash conduct. I think the court should have directed a verdict for the defendant.

Judgment should be reversed, and new trial ordered.

MOORE, J. I cannot agree with the conclusion reached by Justice GRANT. In relation to the two important questions discussed by him, the circuit judge charged the jury as follows:

"I need hardly say to you that the defendant in this case had an undoubted right to have them [the vats] put in the building, and, if it was necessary at that time to remove the stairway and the platform and the door, they had a right to do this also. They had clearly a right, in the manufacture of beer, to make such improvements as were necessary or essential to the proper conduct of their business. Under these circumstances, the law unquestionably cast upon them a duty, and I charge you that the fact of taking up the platform and the stairs just inside of the door by the defendant, forming a pit or an opening in the floor, and the fact that the entrance in question over the platform that had been taken out was the usual and ordinary method of entering that portion of the building known as the shipping room, made it the duty of the defendant to properly guard the opening; and, if it was not practicable to guard it with a railing, to use some

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other and more efficient method. That is unquestionably the law. They knew at that time that people would be likely to go and enter at that door, and it was their duty, having taken up the platform and the stairway, to use a reasonable degree of care to prevent others from going in and going down to their injury. When I say to prevent them, I do not mean to say that it was essential that they should insure the lives of all who came there, for they were not insurers; but they were bound to use that proper degree of care which an ordinarily prudent man would have exercised under like circumstances. That is the only extent to which the defendant in this case can be held. They cannot be regarded as insurers of Mr. Huber's life, nor of the lives of the other employés; but in the conduct of their business, and with reference to this particular danger, they should use that ordinary degree of care that a reasonable man would have exercised under like circumstances. In other words, if the defendant changed its premises or its appliances with which the deceased worked, or which he used in his ordinary employment, between the time he had last used them, so as to render its premises more dangerous than they were before, it became the duty of the defendant either to warn its employés, or to take reasonable means to protect them from accident.

"Now, gentlemen of the jury, you have heard the testimony in this case, and it is for you to determine in this matter whether this is to be regarded as a pure accident, whether the defendant was negligent in failing to properly guard the danger which had been created, or whether the plaintiff's intestate—that is, Conrad Huber himself—was negligent in the way in which he went into the building, as you have heard detailed by the witnesses upon the stand. If it was an accident,—that is, if it was a thing for which nobody was to blame,—then the plaintiff cannot recover in this case. If it was due to the negligence of Mr. Burmeister, he being for the purposes of this case the B. Stroh Brewing Company, and Mr. Huber himself was not negligent, then Mr. Huber could recover, or the plaintiff in this case could recover. But, even though Mr. Burmeister was negligent in the guarding of the doorway, if you find that Mr. Huber did not use such care in the entrance of that building as an ordinarily prudent man would have used under the circumstances, then he cannot recover, even though Mr. Burmeister was negligent. If you find that Mr. Burmeister was not negligent, that he did prop-

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erly guard it, then, even though Mr. Huber did use ordinary care and prudence, he could not recover. So that, in order that the plaintiff may recover in this case, you must determine, first, that Mr. Burmeister was negligent, —that is, that he did not use such care in the guarding of that doorway as a reasonably prudent man would,—and you must also find that Mr. Huber, in going in there in the way that he did go in, did use such care as a reasonably prudent man would have used under the circumstances.

"In determining whether Burmeister did use such ordinary care, you must take into consideration all the testimony. You will remember the width of the door and the size of Mr. Burmeister. Understand, he is the master in this case. You will remember how nearly he filled the door up, and whether he had a right to suppose that standing in the door there as he did was sufficient notice to anybody coming there,—he being engaged in taking off the hinges of the door,—was sufficient notice to anybody coming there that something was going on, and whether it was such notice as would have reasonably put anybody of ordinary prudence upon their guard. That is the real point in this case. If he had a right to suppose that, then he was not to blame, and if he had a right to suppose that, and did suppose it, then this plaintiff cannot recover in this case.

"Now, gentlemen, there is another question in this case, and that is the question of notice. Irrespective of what happened just at the moment of the accident, there is the question of the notice to Mr. Huber. There are the surrounding circumstances, the question of the tubing, the vat, portions being piled around there. That is supplemented by the testimony of one Stempel, who swears that upon the morning in question, and very shortly before the accident, he told the deceased, Huber, having driven around there to load, and found he could not load by reason of the obstruction there, that he told Huber that he could not load there, and that was the reason he was going back to the other entrance, and that they were taking the stairway away. I charge you that, if that testimony is true, and Mr. Huber had actual notice of this, that is an end to this case, because a man cannot disregard a warning of that kind and recover. So, if you find that Mr. Stempel did tell him, that ends the case. If Mr. Stempel made that statement to him, and he understood

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it, he cannot become careless and negligent and go to his death, and then hold anybody responsible for it. That is another element which you will consider."

I think it cannot be said the jury were bound by the testimony of Mr. Stempel. His testimony upon the cross-examination and direct examination differed. It is also contradicted by circumstances. But a few minutes, and probably but a few seconds, after it is claimed Mr. Huber was warned by Mr. Stempel, Mr. Huber, heedless of the alleged warning, rushed into the danger, and to his death. It is hardly credible that he would have done this if the conversation occurred as stated. In any event, it made it a question for the jury whether the warning was given or not.

Did the presence of Mr. Burmeister in the doorway warn him of the danger, so it can be said as a matter of law Mr. Huber was negligent in not heeding the warning? These two men were both in the employ of the defendant. They were well acquainted with each other. Mr. Burmeister was in the doorway apparently for the purpose of removing the door, and was actually engaged in so doing when the accident occurred. Mr. Huber was in the habit of entering the building through this door. The removal of the door would not make it dangerous for him to enter through the doorway. The day was stormy. He knew Mr. Burmeister well. An act which might properly be regarded as rude if it occurred between strangers would have an entirely different aspect when occurring between friends. I do not think it can be said that the presence of Mr. Burmeister in the doorway, as described by the witnesses, was such an indication to Mr. Huber of danger that it can be said as a matter of law that he was guilty of negligence. The disputed questions were left to the jury under a very careful and able charge.

I think the judgment ought to be affirmed.

HOOKER, C. J., and MONTGOMERY, J., concurred with MOORE, J.

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HOWELL ELECTRIC LIGHT & POWER CO. *v.* VILLAGE OF HOWELL.

1. MUNICIPAL CORPORATIONS—CONTRACTS—LIGHTING.
   Under 1 Comp. Laws, § 2908, giving villages general authority to contract for lights, the municipality may be held liable to pay for lights upon any evidence which convinces the jury that the service was rendered and accepted with the expectation that it would be paid for.
2. SAME—RENEWAL OF CONTRACT—PRESUMPTION.
   The renewal of a yearly contract for furnishing lights to a village will not be conclusively presumed from the acceptance of service after the expiration of the contract, where there is anything to show a contrary intention.
3. SAME—EVIDENCE.
   Where a village had a written contract with an electric-light company for street lights for one year, and at the end of the year the company continued to furnish the lights, evidence that the company refused to enter into a new contract except at the old price and for five years, and that, one month after the termination of the contract, the council passed a resolution that it would not accept such terms, is admissible to show that the parties did not understand a renewal of the contract for a year had taken place.

Error to Livingston; Smith, J. Submitted October 15, 1902. (Docket No. 57.) Decided January 6, 1903.

Assumpsit by the Howell Electric Light & Power Company against the village of Howell to recover for street lighting. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Reversed.

Francis J. Shields (*Edmund C. Shields*, of counsel), for appellant.

William P. Van Winkle, for appellee.

MONTGOMERY, J. This is an action of *assumpsit* brought by the plaintiff to recover the sum of $953 for

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electric lights furnished by said plaintiff to the defendant village for the months of February, March, April, May, and 13 days in June, 1901. The charge for said lights was at the rate of $215 per month.

On the 18th of August, 1890, said village passed an ordinance allowing George L. Beetle and J. H. Andrews a franchise to erect and construct an electric-light plant for the purpose of furnishing lights for the streets of said village. On August 18, 1890, said village entered into a written contract with Beetle and Andrews whereby it agreed to pay $60 per light per year for a period of three years to light the streets of said village. Said contract was to begin on the 15th of October, 1890, and end on the 15th of October, 1893; payment to be made by said village regularly at the end of each month. On the 19th of August, 1891, the parties who secured said franchise and contract assigned their interest and right therein to the Howell Electric Light & Power Company, plaintiff in this action. On November 22, 1893, the common council of said village entered into a contract with the plaintiff company for lighting the streets in said village for a term of five years from the 1st day of December, 1893, until the 1st day of December, 1898, by which contract the village was to pay the plaintiff the sum of $60 per light per year; payment to be made at the expiration of each month. On November 30, 1898, another contract was entered into between the parties to this suit, which was to begin on December 1, 1898, and to expire December 1, 1899; payment to be made at the rate of $60 per light per year at the end of each month. At the end of said contract, namely, December 1, 1899, no new contract was made, but the plaintiff company continued to light the streets of said village the same as before, and at the expiration of each month to present its bill for monthly lighting of the streets, and said bills were audited and paid by said village up to the 31st of January, 1901.

On January 2, 1900, immediately following the expira-

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tion of the last written contract, the council of said village passed a resolution expressing dissatisfaction with the lights. On the 31st of January, 1901, a resolution was passed by the village council wherein the council expressly stated that they would not be bound further by lights furnished by said company, and directing plaintiff to cease lighting. Up to the time of the passage of said resolution of the 31st of January, 1901, all bills then owing by said village to said electric-light company were paid and fully satisfied. Some of the officers of the company, including the president and treasurer, were present in the council chamber on the night of the 31st of January, 1901, when the aforesaid resolution was presented and passed. On February 1, 1901, the next day after the passage of said resolution ordering the company to cease lighting, notice was served upon the company, which notice contained the resolution aforesaid. On the 15th of February, 1901, another notice was served upon said company by the clerk of said village. Said company continued to light said village through the months of February, March, April, May, and up to and including the 13th day of June, 1901; and the bills for lighting covering said period were presented to the village council, but were not allowed.

The circuit judge directed a verdict for the plaintiff for the amount of the contract price for the period after notice that the city refused to pay, and before the plaintiff actually ceased to furnish lights. This result was reached by holding that under section 2908, 1 Comp. Laws, the village was not restricted as to the manner in which it might contract; that it was authorized to contract from year to year; and that as it had contracted in writing for the year ending December 1, 1899, and continued to accept like service for more than a year thereafter, the law will imply a promise to pay at the old rate, and a renewal of the contract from year to year.

It may be granted that in a case like the present, where general authority to contract with reference to a subject is conferred, and the manner of executing the power is not

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restricted, the municipality may be held to a contract upon any evidence which convinces the jury that the service was accepted on the one hand with an expectation to pay for it, and, on the other hand, was rendered for an expected compensation. 20 Am. & Eng. Enc. Law (2d Ed.), pp. 1157, 1158. Does it follow that the acceptance of service after the expiration of the year resulted at once, and as a matter of law, in creating a new contract for exactly another year? The cases of hiring by the year are cited in support of the view of liability on this basis, and the familiar rule obtaining in case a tenant holds over after his term is also instanced. If we assume that there is an analogy between these cases and one like the present, we should not lose sight of the limitations upon this rule. If there be anything to show a contrary intention, the renewal of the contract for the stated period will not be inferred. See Mechem, Ag. § 212; *Sines* v. *Superintendents of Poor*, 55 Mich. 383 (21 N. W. 428); *Tallon* v. *Mining Co.*, 55 Mich. 147 (20 N. W. 878). In other words, the rule is in no case so unyielding that a court or jury is bound to foist upon a party a contract which no one expected he was engaged to perform. There is reason to believe that just this is what occurred on the trial of this case.

Defendant offered to show that prior to January 2, 1900, a conference was held between the officers of the plaintiff company and a committee of the common council, and that at said conference the plaintiff's officers refused to enter into any contract at less than the old price, and would not renew on those terms for a shorter period than five years; and in the same connection offered a resolution of the council, adopted January 2, 1900, as follows:

"Moved by Wilcox, seconded by Euler, that the following preamble and resolution be accepted and adopted:

"*Whereas*, the question of lighting the streets of Howell has become a serious one, from the fact that the cost of such lighting is a great burden upon the taxpayers, and constantly increasing as new lights are added, with no hope of a decrease under the present circumstances, as the Howell Electric Light & Power Company refuse to further

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contract with the village unless the present high rate of $60 per light per year is maintained, and ask, furthermore, for a five-year contract at that price, which would amount to $2,580 per year with our present number of lights, viz., 43, and for the five years, with no additional lights, would amount to the enormous sum of $12,900,—an amount more than sufficient to erect and equip a first-class plant. At the termination of a five-year contract, with the present number of lights, at an expense of $12,900, we would be just where we are at present,—at the mercy of a private corporation or company, who, after receiving more than $20,000 of the people's money for lights, are demanding of us to deliver $12,900 more. Deeming the lights insufficient, and terms exorbitant and unjust to the over-burdened taxpayers of the village, we therefore refuse to again contract with the Howell Electric Light & Power Company on the terms demanded by them; and, from facts obtained after careful research by your committee during the past year, we are satisfied that a municipal electric-light plant, to be run in connection with your waterworks plant, would be feasible, and not only effect a great saving in taxes, but furnish more satisfactory results in lighting:

"*Therefore*, be it resolved by the common council of the village of Howell that we hereby declare it is expedient for said village to acquire, by construction, suitable works and apparatus for the purpose of supplying said village of Howell, and the inhabitants thereof, with electric lights.

"Which motion prevailed."

All this testimony was excluded. We think the ruling was erroneous. Had this testimony been admitted, it would have had weight in determining the question whether the plaintiff and defendant understood that a renewal of the contract for a year had taken place, or was expected to follow from a mere indefinite continuation of the service.

Judgment reversed, and a new trial ordered.

HOOKER, C. J., MOORE and GRANT, JJ., concurred.

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COLE *v.* DETROIT ELECTRIC RAILWAY.

STREET RAILWAYS—NEGLIGENCE—INSUFFICIENT EVIDENCE—NEW TRIAL.

Where a judgment against a street-railway company had no other foundation than the testimony of a girl 10 years old that the plaintiff's intestate, a child 2½ years old, was in front of the car, in plain view of the motorman, when the car started, while her testimony before the coroner's jury was that the deceased was clinging to the side of the car near the wheels, and the motorman testified that the child was not in front of the car, a motion for a new trial should have been granted.

Error to Wayne; Hosmer, J. Submitted October 16, 1902. (Docket No. 70.) Decided January 6, 1903.

Case by George W. Cole, administrator of the estate of Winifred Cole, deceased, against the Detroit Electric Railway and the Detroit United Railway, for the alleged negligent killing of plaintiff's intestate. From a judgment for plaintiff, defendants bring error. Reversed.

Plaintiff's daughter Winifred, 2½ years old, was run over and killed by the defendant's car, which was running north on the easterly one of the two tracks on Fourteenth avenue at the intersection with Harper avenue. The declaration charges that the car had stopped at Harper avenue to let passengers off; that the deceased went upon the track and stood in front of the car while it was standing still, with her hands upon the fender; that she was in plain view of the motorman; and that the motorman, without any warning, started the car and ran over her. It charges gross "carelessness, recklessness, and wantonness" on the part of the motorman in failing to see the child.

The motorman testified that, before stopping his car, he saw the little girl standing at the northwest corner of these

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avenues, upon a grass plat between the curbstone and the sidewalk, with her hand against a tree. When the car stopped, she was out of the range of his vision. He swore positively that, when he started, she was not standing in front of the car. After the car had stopped, the deceased ran into the street, across the other track, to the car. No one upon the car saw her or knew of the accident until the car returned, a few minutes later. The car went only two blocks beyond, and then returned. The car was a closed one, with doors on the east side.

The right of recovery is based upon the testimony of one witness for the plaintiff, Mabel Perry. She was eight years old at the time of the accident, and ten at the time of the trial in the court below. Upon the trial she testified that the deceased stood on the track, directly in front of the fender, where she was in plain sight of the motorman. Immediately after the accident an inquest was held before a coroner's jury. Mabel was taken by her uncle before the jury to testify in regard to the accident. She was the sole witness to it, except a little girl five years old. A stenographer took her testimony at the inquest, and the coroner wrote out a statement, which she signed. She then testified positively that the deceased was not in front of the car; that she was on the side of the car, "right near the front wheels," and had hold of something on the side of the car. When her signed statement and the stenographer's minutes were read to her, she did not positively deny any of the statements read to her. To some she said, "I don't remember so testifying;" to some, "I don't think I said it." The following question and answer were read to her from the stenographer's minutes: "*Q.* She tried or had hold of something that was on the side of the car, did she? *A.* Yes, sir." In reply to the question whether she so testified, she said, "I would not say I did not say it." Her written statement, read to and signed by her at the close, and the stenographer's minutes, duly proved, were read in evidence. The coroner, some of the jurors, and a woman,—Mrs. Dibble,—who was present

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when she gave her testimony at the inquest, testified positively that she there testified as above. There were six of these witnesses.

The case was submitted to the jury, who found a verdict for the plaintiff. Defendant made a motion for a new trial on the ground that the verdict was against the clear preponderance of evidence. In support of the motion, it filed the affidavit of Mrs. Dibble that, about 20 minutes after the accident, the witness Mabel told her that the deceased "ran out and took hold of the side of the car just back of the fender, and when the car started she tumbled and rolled under the wheels." The motion was denied, exception duly taken, and the ruling of the court is now before us for review, under Act No. 134, Pub. Acts 1893 (3 Comp. Laws, § 10504).

Corliss, Andrus, Leete & Joslyn, for appellants.

J. Walter Dohany, for appellee.

GRANT, J. (*after stating the facts*). The verdict and judgment have no other foundation than the testimony of the witness Mabel Perry. If the testimony given by her at the inquest is true, the defendant is not liable. If her testimony given upon the trial be true, not only is the defendant liable for damages, but the motorman is liable to indictment for manslaughter, — for conduct wholly regardless of human life. If the versions of this accident given by this witness on the two occasions are directly contrary to each other, and there is no reasonable explanation for her change of testimony upon the trial from that upon the inquest, she is unworthy of credence, and a verdict based thereon ought not to stand. To find a verdict for the plaintiff, the jury must have wholly disregarded the testimony of the six disinterested witnesses who testified to what Mabel said at the inquest, and the positive and unequivocal testimony of the motorman that the deceased was not upon the track in front of the car. It is important, therefore, to consider the character of the impeach-

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ing testimony. There is no room for holding that the six witnesses are mistaken in their testimony. The material part of Mabel's testimony was written out by the coroner, and read to and signed by her. The stenographer wrote out his minutes by questions and answers, and swore to their correctness. Four other witnesses swore positively to the same effect.

The verdict cannot be sustained upon any other theory than that these seven witnesses testified falsely. I find it impossible to disbelieve them. They are unimpeached by anything in this record. The witness herself does not deny their statements. It is therefore established beyond controversy that she did so testify at the inquest, when, as she admitted upon the trial, the occurrence was fresh in her mind. Besides, the version given by her at the inquest is entirely natural, while that given upon the trial is not. It is unnatural and improbable that the motorman started his car with the girl standing within a few feet and directly in front of him, and in his plain sight. I cannot consent that persons be deprived of their property or liberty upon such a record. The declaration is based upon gross, wanton, and reckless negligence. It can be sustained upon no other theory. Yet the jury, by wholly disregarding the testimony of the seven witnesses, and adopting the version of a witness who two years before, and at the time of the accident, gave an entirely different version, and one which entirely exonerated the defendant from any negligence, found that the motorman was guilty of the grossest negligence. The two versions are utterly irreconcilable.

In a case where the liability of the defendant depended upon the testimony of only one witness, and he was contradicted by several other disinterested witnesses, and, as in this case, gross negligence was charged, and the court refused to set the verdict aside, we said:

"The refusal to grant a new trial upon a verdict rendered upon such evidence is very close to an abuse of judicial discretion." *Brassel* v. *Railway Co.*, 101 Mich. 5, 13 (59 N. W. 426, 428).

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We also there held that it was impossible to read the record without coming to the conclusion that the jury utterly ignored the clear weight of the evidence in the case.

So, also, in *Whipple* v. *Railroad Co.*, 130 Mich. 460 (90 N. W. 287), we said:

"But if it should be held that it was not error to submit the case to the jury, their verdict was so palpably unjust and at variance with the great preponderance of evidence that the court should not have denied a motion for a new trial."

The language in those cases is especially applicable to this.

The judgment is reversed, and new trial ordered.

HOOKER, C. J., and MONTGOMERY, J., concurred with GRANT, J.

MOORE, J. I concur in the result reached by GRANT, J.

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CENTRAL BITULITHIC PAVING CO. *v.* MANISTEE CIRCUIT JUDGE.

COMMON COUNCIL OF CITY OF MANISTEE *v.* SAME.

1. MANDAMUS—INJUNCTION—DISSOLUTION—EXIGENCY.
   Where there is no exigency requiring immediate action, an order of a circuit judge refusing to dissolve an injunction will not be reviewed on *mandamus*, unless the question in dispute is one of law only, and such judge has acted without jurisdiction.

2. EQUITY JURISDICTION—MUNICIPAL CORPORATIONS—FRAUD—PAVING CONTRACT.
   Where, through the fraudulent conduct of city officers, a paving contract has been departed from in the construction of the work, to the damage of the municipality, equity has jurisdiction to restrain the work upon the complaint of taxpayers.

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Mandamus by the Central Bitulithic Paving Company, and the common council of the city of Manistee and others, to compel Aaron V. McAlvay, circuit judge of Manistee county, to dissolve a preliminary injunction. Submitted November 18, 1902. (Calendar Nos. 19,648, 19,649.) Writs denied January 6, 1903.

On April 7, 1902, the electors of the city of Manistee authorized the issuance of bonds for $125,000 for the purpose of paving its streets. On July 19th following, a contract was made between the Central Bitulithic Paving Company and one of the relators in the other petition, the common council of the city of Manistee, for paving certain streets at a price of $106,000. The company entered upon the work. In August following, two taxpayers filed a bill of complaint against the relators, alleging fraud on the part of the mayor and some of the councilmen in the making of the contract, and fraudulent conduct on the part of certain others who were charged with the execution of the contract, and the company in executing it. It is charged that the contract has been departed from, to the detriment of the taxpayers of the city and to the benefit of the company, and that these departures have not been made in good faith, but fraudulently and corruptly. This departure from the work is alleged to have been made in the face of the following provision of the contract:

"It is mutually agreed between the parties that no deviations from the contract can be authorized by any inspector of the work, and that the city is in no way bound to accept work not in accordance with the specifications, although such work may not have been objected to by the inspector."

The respondent granted a preliminary injunction. The relators filed answers denying the material allegations of the bill, and moved to dissolve the injunction, which motion was heard September 2d. At this hearing the complainants in the chancery suit were permitted to file affidavits in opposition to those filed on behalf of the

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relators. After full argument and due consideration, the respondent refused to dissolve the injunction. On November 3d, relators presented their petitions in this court, asking for the writ of *mandamus* to compel the respondent to vacate his order and to dissolve the injunction.

Dovel & Smith and *P. T. Glassmire* (*Humphrey & Grant*, of counsel), for relators.

Frank L. Fowler, for respondent.

GRANT, J. (*after stating the facts*). Relators waited two months after the order of the respondent refusing to dissolve the injunction, before applying to this court for relief. The respondent returns that no work can be done during the winter, and until May next, and that during this time the case can be heard upon its merits and determined both in the circuit and supreme courts. There is therefore no exigency requiring immediate action.

Relators ask relief on two grounds: (1) Because the showing before the respondent was insufficient to justify the issuance of the injunction; (2) that the court had no jurisdiction to grant it, because the case made by the bill is not one of equitable cognizance.

As to the first ground, no exigency existing, an appeal from the decree, made after hearing and upon the merits, is the proper remedy. Even an abuse of discretion by a circuit judge in granting and maintaining a preliminary injunction will not be reviewed on *mandamus*, when, without injury to the rights of the defendant, the case can be heard upon its merits. Where, however, the court acts entirely without jurisdiction, and the question in dispute is one of law merely, the court will dispose of it in a *mandamus* case. *Ionia, etc., Ins. Co.* v. *Ionia Circuit Judge*, 100 Mich. 606 (59 N. W. 250, 32 L. R. A. 481).

Elaborate and lengthy briefs are filed by the learned counsel for both sides upon this question. Many of the cases cited by the relators were decided upon an appeal from a decree after a hearing and upon the merits. Where fraud is alleged, either in the procuring of a contract or in

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its execution on the part of the officers of a municipality and the contractors, in consequence of which damage, it is alleged, will result to the municipality, courts of equity may interfere by injunction to restrain the execution of the contract, if fraudulent, or, if valid, to restrain the fraudulent execution of it. Corrupt conduct is charged on the part of the mayor and other officers in making this contract. No complicity appears to be charged against the company. Were this the only question presented by the pleadings, we are not prepared to say that the bill presents a case for equitable cognizance. But direct charges are made and verified of unwarranted departures from this contract, by which, if true, the city will be defrauded and the contractor benefited. We think the allegations are sufficient to give the court jurisdiction of a case of this character. *Dixon* v. *City of Detroit*, 86 Mich. 516 (49 N. W. 628).

We do not deem it essential to state the several departures from the contract which are alleged to be fraudulently made. It is sufficient to say that if corruptly made, and if the taxpayers of the city will suffer loss thereby, equity may and ought to interfere seasonably to restrain the illegal action. The truth of these allegations can be determined only upon the hearing. The cause was noticed for hearing upon pleadings and proofs at the November term of the circuit court. It can be speedily disposed of in sufficient season for the renewal of the work in the spring. Should the complainants neglect to move promptly, the relators can renew their application to the circuit court, in which case a bond should be given to indemnify the contractor, or the injunction dissolved. Private parties should not be permitted to interfere, even by injunction, with the carrying on of public works, upon charges of corruption, which will depend entirely upon the proof, in cases where the public and the contractor may suffer great and irreparable damages, and where the charges are denied under oath.

Complaint is made that the proper practice was ignored

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in permitting the complainants in the chancery suit to file additional affidavits upon the hearing of the motion to dissolve the injunction. This is contrary to the usual practice, but it has its exception. 2 High. Inj. (3d Ed.) § 1603.

The writs are denied.

The other Justices concurred.

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CITY OF MARQUETTE *v.* MICHIGAN IRON & LAND CO.

1. TAXATION—LAND CONTRACTS—CREDITS.
   A contract for the sale of standing timber, which contains a provision that the title to the timber and manufactured products thereof shall remain in the vendor until paid for, that the vendee shall pay all taxes assessed upon the land, the usual forfeiture clause, and places the risk of damage to the timber upon the vendee, should be taxed as a credit to the vendor, under 1 Comp. Laws, § 3831, subd. 6.

2. SAME.
   A contract for the sale of land at a specified price, with the usual forfeiture clauses, and an agreement that the vendee shall pay all taxes assessed upon the land, should be assessed as personal property.

3. LAND CONTRACTS—OWNERSHIP.
   Under such contracts the purchaser is the equitable owner of the property.

4. DOUBLE TAXATION—LAND CONTRACTS.
   The taxation of a land contract as personal property does not constitute such double taxation as to violate the constitutional requirement of uniformity in taxation, where the contract provides that the vendee shall pay the taxes on the land.

Case made from Marquette; Stone, J. Submitted November 18, 1902. (Docket No. 39.) Decided January 6, 1903.

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Stipulated case between the city of Marquette and the Michigan Iron & Land Company, Limited, to determine the latter's liability for taxes. There was a judgment for plaintiff, and defendant assigns error. Affirmed.

Ball & Ball, for appellant.

George P. Brown, for appellee.

CARPENTER, J. The court below held that defendant must pay taxes upon the sum of $59,733.34, the balance unpaid on contracts for the sale of standing timber, and upon the sum of $30,384, the balance unpaid upon contracts for the sale of land. By the terms of the contracts for the sale of timber, defendant agreed to sell to the vendee "all the merchantable timber, now fit for saw-logs, growing, standing, or being upon the following described lands," and "that the title to the said timber and the manufactured products thereof shall be and remain in the party of the first part [the defendant] unless and until paid for and removed as hereinafter mentioned." The vendee agreed to pay a certain specified price for this timber, and to pay to the vendor "all taxes and charges, general and special, of every kind whatsoever, that shall be assessed upon or against the above-described lands subsequent to the date hereof." The contract contained the usual clause of forfeiture, and expressly placed upon the vendee the risk of damages to the timber from "fires, storms, trespasses, or any or all causes whatsoever." The land contracts contained an agreement on the part of the defendant to sell a particular description of land upon the payment of a specified sum, which the vendee expressly agreed to pay. They contained the usual clauses of forfeiture, and an agreement that the vendee "should pay all taxes or assessments upon said premises * * * whenever and as soon as they shall become due and payable," and provided for a deed to the vendee when all his "agreements and undertakings" were performed.

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1 Comp. Laws, § 3831, subd. 6, makes taxable "all credits, of every kind, belonging to inhabitants of this State." Defendant's counsel insists that the obligations in question are not credits. He argues that they should be classed with obligations to pay future rent upon existing leases, obligations to pay salary under contracts for future services, and with obligations to pay for the future delivery of the products of a farm, of a shop, or of a mine. If the obligations in question are indistinguishable from those above instanced, we think that it should be decided that they are not taxable; but, in our judgment, they are clearly distinguishable. In the instances supposed, the landlord will receive rent for the future use of his own property, the employé will receive wages in payment for his future services, and the farmer, manufacturer, and miner will receive pay for the sale of products which, until the sale is consummated, belong to them. In none of these cases is a credit contemplated. On the other hand, by the contracts under consideration (and this is as true of the timber as of the land contracts) the equitable title to the property therein described is at once transferred to the vendee. From the time these contracts are made, the vendor holds the legal title only as trustee for the vendee. *Walker* v. *Casgrain*, 101 Mich. 604 (60 N. W. 291); *Fitzhugh* v. *Maxwell*, 34 Mich. 138; *Wing* v. *McDowell*, Walk. Ch. 175; *Bowen* v. *Lansing*, 129 Mich. 117 (88 N. W. 384, 57 L. R. A. 643). The vendor has, in effect, exchanged his property for the unconditional obligation of the vendee, the performance of which is secured by the retention of the legal title. The fact that the vendee, in the case of the land contract, may, when making his final payment, demand a conveyance, does not distinguish the obligation from that of a credit secured by a mortgage, as the mortgagor may, when making his final payment, demand a discharge of the mortgage. The obligations under consideration, therefore, resemble, not agreements to pay future rent, or salary to be earned in the future, or promises to buy merchandise and products to be delivered

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in the future, but credits secured by mortgages. The resemblance between these obligations and credits secured by purchase-money mortgages may best be described by stating that they differ only in this: That the vendor has a remedy to enforce his rights which is not given to the mortgagee, namely, he may take immediate possession of his security. Such an inconsequential difference affords no ground for a legal distinction. The decisions of this court which hold all credits secured by mortgages taxable are therefore, in our judgment, decisive of the proposition under discussion. *Attorney General* v. *Supervisors of Sanilac Co.*, 71 Mich. 16 (38 N. W. 639); *City of Detroit* v. *Lewis*, 109 Mich. 155 (66 N. W. 958, 32 L. R. A. 439). This precise question has been decided by the courts of other States in conformity with these views. Cooley, Tax'n (2d Ed.), p. 78; *People* v. *Trustees of Ogdensburgh*, 48 N. Y. 390; *County of Ouachita* v. *Rumph*, 43 Ark. 525; *State* v. *Rand*, 39 Minn. 502 (40 N. W. 835); *Perrine* v. *Jacobs*, 64 Iowa, 79 (19 N. W. 861); *People* v. *Rhodes*, 15 Ill. 304; *People* v. *Worthington*, 21 Ill. 171 (74 Am. Dec. 86); *Griffin* v. *Board of Review*, 184 Ill. 275 (56 N. E. 397); *Adams* v. *Clarke*, (Miss.) 31 South. 216.

Aside from the dissenting opinions in two of the above cases, the only authority referred to by counsel for defendant in support of his position is *Brown* v. *Thomas*, 37 Kan. 282 (15 Pac. 211). In that case it was decided that the interest of the vendor, arising out of a contract to sell land similar to the land contract under consideration in this case, was not taxable. The court reasons as follows:

"The agreement for the sale of the real estate described in the petition confers neither the legal nor the equitable title upon Davidson [the vendee]. It is simply an agreement to sell real estate upon conditions precedent, and sets forth a conditional sale only. * * * The legal title has not passed to him, because no deed or other conveyance has yet been made; and the equitable title has not passed, because the land has not been paid for, and because, on account of the provisions for forfeiture, it is clearly the

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intention of the parties, as indicated in the contract, that such title shall not pass until the land is paid for. * * * If we could consider the agreement a mortgage merely, then, as personal property, it would be taxable. As the agreement cannot be construed into a mortgage, nor as creating a debt, but being a conditional sale only, we must hold that it is not subject to taxation. If it be claimed that the agreement is a 'credit,' and therefore taxable, the claim is defeated by the definition given to 'credit' by the tax law, as follows:

"'The term "credit," when used in this act, shall mean and include every demand for money, labor, or other valuable thing, whether due or to become due, but not secured by lien on real estate.'

"We do not think the agreement creates a debt, but, if any demand for money is created thereby, it is secured on real estate, and therefore not a 'credit,' within the statute."

This reasoning has no application to the case at bar. The contracts under consideration, construed according to the laws of Michigan, as they must be, do not "set forth a conditional sale only," but do, as we have already shown, transfer an equitable title to the vendee. Under the laws of Michigan, credits are taxable, though they are secured by a lien on real estate.

It is also insisted by defendant's counsel that to tax both the property contracted to be sold and the credit in question is such a double taxation as to violate the constitutional provision requiring uniformity. It is to be noted that in this case the obligation to pay the taxes upon the property rests not upon the vendor (the defendant), but upon the vendees. Therefore the argument advanced in support of this contention is precisely the argument which has been advanced to prove that the taxation of credits secured by mortgage and of the land covered by the mortgage is unconstitutional. The decision of this court upholding the constitutionality of such taxation (*Attorney General* v. *Supervisors of Sanilac Co.*, 71 Mich. 16 [38 N. W. 639]) is controlling and decisive of this question.

The judgment of the court below will be affirmed, with costs.

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HOOKER, C. J., MOORE and MONTGOMERY, JJ., concurred with CARPENTER, J.

GRANT, J. I concur in the opinion of my Brother CARPENTER, for the reason that the defendant had relieved itself from the payment of taxes upon its lands, specified in the land and timber contracts, and had imposed that duty upon its vendees. This is not a case where the landowner contracts to sell his land, which must still be taxed to him, and from the payment of taxes upon which he has not relieved himself by transferring that obligation to another. In such case I am not prepared to hold that the taxation to the landowner of both his land and the contract to sell it would not be double taxation and void.

JUNE v. LABADIE.

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1. LOST LETTERS—PAROL EVIDENCE.
   Where defendant gave plaintiff notice to produce all letters written by her to plaintiff between certain dates, evidence that she had written letters not produced, and destroyed some of those received by her at plaintiff's request, sufficiently accounts for the loss of the letters to justify parol evidence of their contents.

2. CONTRACTS—MARRIED WOMEN—SEPARATE ESTATE.
   A contract by a married woman to pay for the board of an adult sister and her children does not relate to her separate estate, and is void.

3. INSTRUCTIONS TO JURY—PROMISSORY NOTES—MAKER AND INDORSER.
   In an action on a promissory note against the maker and indorser, an instruction which assumes that the defendants are sued as joint makers is erroneous.

4. SAME—WANT OF EVIDENCE.
   An instruction that a certain agreement to pay for the board of

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a third person would constitute a set-off against a promissory note should not be given where there is no evidence to support such an agreement.

Error to Wayne; Rohnert, J. Submitted November 21, 1902. (Docket No. 113.) Decided January 6, 1903.

Assumpsit by Mary J. June against Sophie E. Labadie and Joseph A. Labadie on a promissory note. From a judgment for defendants, plaintiff brings error. Reversed.

Plaintiff and defendant Sophie are sisters. The suit was commenced in justice's court upon a promissory note, which reads as follows:

"$142.04. DETROIT, MICH., January 2d, 1893.
"One year after date I promise to pay to the order of Mary J. June one hundred and forty-two and 04/100 dollars, at 74 Buchanan street, Detroit, Mich., with interest at six per cent. per annum. Value received.
[Signed] "SOPHIE E. LABADIE."

It was indorsed, "This note is to replace one of like purpose and amount that has been lost." It was also indorsed by the defendant Joseph, Sophie's husband. Under an appeal to the circuit court, a jury rendered a verdict for defendants.

A. G. Pitts, for appellant.

John W. McGrath, for appellees.

GRANT, J. (*after stating the facts*). 1. Plaintiff lived in New York and defendants in Detroit. The main defense is a set-off for the board of a Mrs. Kelly, their sister, and her children. Defendants claim an agreement made by letters between Sophie and the plaintiff, by which the plaintiff agreed to pay $5 a week for the board of Mrs. Kelly and her children, and that they boarded with her 84 weeks. Defendants gave plaintiff notice to produce all letters written by defendants, or either of them, to her between September 1, 1895, and May 8, 1897. In obedi-

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ence to such notice certain letters were produced. Defendants also produced certain letters written by plaintiff to defendant Sophie. These letters are not of themselves sufficient to establish the contract claimed. Defendant Sophie was then permitted, under objection, to state the contents of other letters written by her to the plaintiff and those received by her from the plaintiff. She testified that she destroyed most of the letters received from the plaintiff because plaintiff requested her to do so. She stated the contents of one of them as follows:

"In the letter she said that they [meaning Mrs. Kelly and her children] could stay with me, and make a visit, and it would not cost me any more for rent, and she would pay $5 a week for whatever they would eat, so that my husband would not be any money out of pocket."

Witness then continued:

"I replied, under those conditions they could come; and they came, and remained a year and nine months."

Plaintiff denied writing such a letter or receiving such a letter from the defendant. While such testimony of written documents is very unsatisfactory, yet we think their loss was sufficiently accounted for to justify parol evidence of their contents. It is also urged that there was no proof that these letters were mailed, and that, therefore, the testimony was incompetent. As the case will be reversed upon other points, we need not determine this.

2. The court should have instructed the jury that the plaintiff, being a married woman, had no power to make the contract which defendants claim. It had no reference to her separate estate. It did not provide any consideration moving to her. She was to receive nothing. The married woman's act does not remove from her all disability to make contracts. It removes only the disability to make those which relate to her separate estate. She may make a valid contract with a physician for medical services to be rendered to herself and her daughter by a

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former marriage. Such contract is for her benefit. *Goodman* v. *Shipley*, 105 Mich. 441 (63 N. W. 412). She may bind herself and her estate by the purchase of goods for her minor children (*Hirshfield* v. *Waldron*, 83 Mich. 116 [47 N. W. 239]), and for necessaries purchased for family use (*Campbell* v. *White*, 22 Mich. 178). In these cases the title to the goods passed to her, and became her separate property.

"Her promise to pay must be based on a consideration in the shape of property. She has no power to make contracts except concerning her separate estate, which must be either by making agreements concerning property already possessed, and referring to it, or else concerning property acquired by the contract, or in consideration of it." *Johnson* v. *Sutherland*, 39 Mich. 579, 580.

In this case no property passed. Her estate was not to be benefited. She was under no legal obligation to take care of her sister. The contract, by no possibility, could benefit her or her estate. It was a contract simply to pay out money for another to the depletion of her estate. Such contracts are not within the married woman's act.

3. The court instructed the jury as follows:

"If you should not be satisfied from the evidence that this is a loan made by Mary June to Sophie Labadie individually— If you are satisfied that it was individual, that the consideration was to her individually, then the plaintiff is entitled to recover; but if you determine that the loan was made to Sophie E. Labadie and Joseph Labadie for the benefit of both of them, then there cannot be a recovery on this note, because, it being sued against them jointly, there is a joint obligation, which can only be sustained in case you find that the obligation, so far as Labadie is concerned, was simply that of an additional guarantor; that is, by finding that the consideration passed to Sophie Labadie for herself."

The principle of law involved in this instruction may be correctly stated. The vice of the instruction lies in the facts assumed. I find no evidence in the record that this loan was made to the two jointly, or that the defendants

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were sued as joint makers, or that they were in fact joint makers. *Prima facie* one was maker and the other indorser. The only reference in the record to the declaration is found in the justice's return in the following language:

"The plaintiff declares in *assumpsit* on all the common counts, and especially on a promissory note filed."

This is not a declaration against the defendants as joint makers, but as maker and indorser.

The alleged contract for board was not made with the two defendants jointly. The contents of the lost letters, as testified to by Sophie, which it is claimed established the contract, contain no reference whatever to any promise on the part of plaintiff to Joseph. They refer solely to a personal transaction between the two sisters. The only defense interposed is, Was there a contract for the board of Mrs. Kelly, made between plaintiff and defendant Sophie? If there was, and it was valid, the offset was sufficient to defeat a judgment. Any defense found valid against the maker of course releases the indorser. Under the present record defendant Sophie is maker of the note and defendant Joseph is liable as indorser.

4. The court instructed the jury that if Mrs. Kelly, Mrs. June, and Mrs. Labadie made an arrangement by which Mrs. Kelly was to board with Mrs. Labadie, and Mrs. June agreed to pay $5 a week for it, such a contract would be binding, and sustain the defendants' set-off. Plaintiff's counsel conceded that, if this were the arrangement, it would be binding. The objection to the instruction is that there is no evidence upon which to base it, and we find none in the record.

Judgment reversed, and new trial ordered.

The other Justices concurred.

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MORLEY *v.* QUIMBY.

REAL ESTATE—FIXTURES—MORTGAGE.

A mill and milling machinery placed upon land by one occupying under a contract of purchase become part of the real estate, and are covered by a subsequent mortgage of the land.

Appeal from Kent; Wolcott, J. Submitted December 2, 1902. (Docket No. 135.) Decided January 6, 1903.

Bill by Clara S. Morley, administratrix *de bonis non* of the estate of George I. Quimby, deceased, against Emeline K. Quimby, Alice F. Uhl, executrix of the last will and testament of Edwin F. Uhl, deceased, John T. Byrne, and others, for the foreclosure of a mortgage. From a decree for complainant, defendant Uhl appeals. Affirmed.

Taggart, Denison & Wilson, for complainant.

Burlingame, Belden & Orton, for appellant.

T. J. O'Brien and *J. H. Campbell*, for defendant Byrne.

CARPENTER, J. This suit was commenced in the circuit court for the county of Kent, in chancery, for the foreclosure of a mortgage covering lots 82, 83, 84, and 85 of the Coit & Curtis partition plat in the city of Grand Rapids. The only question in controversy is whether or not said mortgage covers the mill and milling machinery therein, standing upon said property.

This mortgage was given by George I. Quimby, complainant's intestate, on the 10th day of May, 1888, to George B. Warren and John A. Manning, executors of the estate of George B. Warren, deceased. It was given to pay a part of the purchase price of said property, which, on said 10th day of May, 1888, was conveyed to said

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George I. Quimby by Evelyn L. Hatheway, as executrix of the will of, and universal legatee of, James S. P. Hatheway, deceased. On September 10, 1894, complainant purchased said mortgage with funds of the estate of said George I. Quimby, deceased.

When said George I. Quimby obtained said deed and made said mortgage, the mill and milling machinery in question were standing on the mortgaged property, and being operated by Edwin F. Uhl (testator of defendant and appellant Uhl), as assignee of Ichabod L. Quimby (the father of George I. Quimby). Said James S. P. Hatheway acquired the property August 30, 1881, by purchase at the foreclosure sale of a mortgage given by said Ichabod L. Quimby. When this foreclosure sale occurred, said Uhl, as assignee aforesaid, was in possession of the mortgaged property, operating a mill belonging to the assigned estate. After the foreclosure he continued his occupancy, and carried on business as theretofore. On the 21st of October, 1881, the mill took fire, and was partially destroyed. In 1882, the mill and milling machinery in controversy were constructed by Uhl, at a cost of about $15,000, out of funds of the assigned estate, and by the use of some of the machinery formerly used in the burned mill.

It was decided by this court in the case of *Quimby* v. *Uhl*, 130 Mich. 198 (89 N. W. 722), that after the 1st of July, 1887, when the last of the debts of Ichabod L. Quimby was paid, the title of the assigned property vested in the assignor, said Ichabod L. Quimby.

The court below found that, after said James S. P. Hatheway acquired title to said premises at said foreclosure sale, "the said Edwin F. Uhl, assignee as aforesaid, remained in possession of said premises and continued the business on said premises * * * under an arrangement with said Hatheway by which the said premises were to be occupied by said Edwin F. Uhl, assignee, and conveyed to him, or to said Ichabod L. Quimby, or to such person as the said Ichabod L. Quimby or Edwin F.

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Uhl, assignee, should direct;" and "that it was the intention of the parties to said $5,000 mortgage, and of said Edwin F. Uhl, assignee, and of said Ichabod L. Quimby, that said $5,000 mortgage should cover said premises, including all buildings thereon, and including the boiler, engine, and machinery contained in said factory or mill;" and, in accordance with these findings, it was decreed that "the lien of said mortgage extends to all of the buildings and improvements on said premises, including said mill or factory, and the engine, boiler, and all machinery in and about said mill or factory, and all fixtures and appliances designed for use in said factory building." From this decree defendant Uhl appeals, contending that neither of said findings is warranted by the testimony in the case.

As Edwin F. Uhl, Ichabod L. Quimby, George I. Quimby, and James S. P. Hatheway all died before this suit was commenced, we have no direct testimony to prove the arrangement under which said Uhl continued his occupancy of the premises in suit after the foreclosure sale in August, 1881. That arrangement is, however, sufficiently proved by the circumstances of the case, and the answer of said Uhl in the case of *Quimby* v. *Uhl*, heretofore referred to. In that answer, Mr. Uhl said:

"I deny that, after the destruction of the mill standing on the property, I, without leave, caused to be erected on the said premises another mill; but I insist that such mill was reconstructed in pursuance of a valid agreement with the parties in interest, and that said mill has, since its reconstruction, been continuously and profitably operated for the benefit of the said Ichabod L. Quimby and the parties in interest, and that said transaction of the repurchase, after foreclosure, in the name of the said George I. Quimby, was in pursuance of an arrangement between him and the said Ichabod L. Quimby. * * * I say that the negotiations for perfecting the title to the said Grand Rapids mill property were conducted by the said Ichabod L. Quimby, assisted by the said George I. Quimby; that said Grand Rapids mill was, and ever since has been, essential to the purposes of said business, without

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which the same could not successfully have gone forward; that the title thereto was taken in accordance with an arrangement between the said Ichabod L. Quimby and the said George I. Quimby; and, in my opinion, the title was taken in the name of the said George I. Quimby in the expectation, entertained by both, that some time in the future, on just and equitable terms, the said George I. Quimby would become the owner of the Quimby property and business. His death intervening, there was no consummation in that regard. * * * It was always my understanding that the said Ichabod L. Quimby was the real, substantial owner, but that, by some arrangement between himself and George, the title was held by the latter."

And:

"That the property * * * was purchased for the benefit of the assigned estate, and paid for out of the proceeds of the business."

The agreement under which said Uhl continued his occupancy must have been, and therefore was, either a contract of sale or a lease. The circumstances are inconsistent with a lease. It is hardly conceivable that Mr. Uhl should have expended $15,000 of trust funds in constructing and equipping a mill, so "essential to the purposes of the business," without being assured of a right to continue its use, or that he made such expenditure with the intention of such a partial destruction as would result from its being detached and removed.

The conduct of Mr. Hatheway, and, after his death, of his personal representative, is equally inconsistent with the theory of a lease. During the seven years intervening between Hatheway's purchase at the foreclosure sale and the conveyance to George I. Quimby, said Uhl, though he paid the taxes on said property, paid almost nothing else which could have been applied for its use. That Mr. Hatheway or the Hatheway estate should have permitted the rent to go uncollected until this time, if there had been, as appellant contends, only a lease, or a lease with the privilege of purchase (which gave the owner no interest in the improvements made by the tenant,—*Osborn* v.

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Potter, 101 Mich. 301 [59 N. W. 606]), is inconceivable. If, on the other hand, the occupancy was under a contract of sale, and the purchaser had put upon the property improvements to the value of $15,000, there was no risk in letting this account run.

These circumstances, together with the statement of Mr. Uhl in his answer, contained in the above quotation, that such mill was constructed "in pursuance of a valid agreement," and his reference to the negotiations for taking the title in the name of George I. Quimby as "perfecting" the title, convince us of the correctness of the finding of the circuit judge that the occupancy was based on an agreement for a subsequent conveyance. The improvements in question, having been made by one in possession under a contract of purchase, became part of the real estate. *Michigan Mut. Life-Ins. Co.* v. *Cronk*, 93 Mich. 49 (52 N. W. 1035); *Cutter* v. *Wait*, 131 Mich. 508 (91 N. W. 753). A title in them, therefore, passed by the conveyance to George I. Quimby of May 10, 1888, which was covered by the mortgage in suit. It is unnecessary to determine whether or not the conveyance of May 10, 1888, to George I. Quimby merged the interests in said land theretofore separately held by the Hatheway estate and Ichabod L. Quimby. It is sufficient that George I. Quimby thereby acquired the title of the Hatheway estate to the land and improvements thereon to secure the balance unpaid (part of which is represented by the mortgage in suit) on said contract of sale.

Appellant's counsel insist that said occupancy was not under a contract of purchase, because it is not to be presumed that Mr. Uhl, as assignee, intended the title to these improvements to pass out of the assigned estate into Mr. Hatheway. We do not impute to Mr. Uhl any such intention, nor does it result from our conclusion that these improvements at once became the property of Mr. Hatheway. These improvements became part of the real estate. They enhanced the value of Mr. Hatheway's security. They belonged, however, to the vendee in the contract, as

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the equitable owner of the entire property. If the contract was fulfilled according to its terms, the vendor obtained no benefit whatever from the enhanced value of his security. If the vendee failed to perform his contract, the improvements returned, with the land, to the vendor. It was not so much a violation of Mr. Uhl's trust to make these improvements upon land which he had contracted to buy for the trust as it would have been to make them upon land in which the trust had only a leasehold interest. In the one case the trust could secure the entire benefit of the improvements, while, in the other, it must lose a part or all of that benefit. Even if it be true that, technically speaking, Mr. Uhl had no authority, as assignee, to contract for the purchase of land, it is more likely that he assumed such power than that he voluntarily took a step which inevitably led to a waste of trust assets. We attribute to him a regard for the best interests of his trust in concluding that these improvements were made on land which he had contracted to buy for said trust.

It results from this reasoning that the mortgage in suit covers the property in controversy, and that we have, therefore, no occasion to determine the intent with which it was given.

The decree of the court below is affirmed.

The other Justices concurred.

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ALTHOUSE v. McMILLAN.

1. CONTRACTS—PAROL EVIDENCE.
   The testimony of a party to a written contract of sale of certain heading, that the place of delivery was Liverpool, there being no doubtful phrases in the contract, is inadmissible.

2. SALE—DELIVERY TO PUBLIC CARRIER.
   Under a contract for the sale of heading at "$6.35 per 100 sets,

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delivered, less New York rates of freight; terms net 30 days from date of shipment," the title passes to the purchaser upon delivery of the heading to a public carrier, and the transmission of bill of lading, with invoice attached, to the purchaser, in compliance with the terms of the contract.

Error to Saginaw; Snow, J. Submitted December 4, 1902. (Docket No. 195.) Decided January 6, 1903.

Replevin by Clarence W. Althouse against John G. McMillan and Charles F. Ford. From a judgment for plaintiff on verdict directed by the court, defendants bring error. Reversed.

T. A. E. & J. C. Weadock, for appellants.

Weadock & Purcell, for appellee.

CARPENTER, J. Plaintiff brought this action of replevin to recover a car load of heading which defendants had seized under a writ of attachment against one M. S. Daniels. The heading, when attached, was in transit from Clare, Mich., to Liverpool, England, in pursuance of a contract of sale between said plaintiff and said Daniels. The only question in this case is whether, under said contract, the title to said heading had or had not passed to Daniels.

The contract was made by correspondence. Plaintiff agreed to sell and Daniels agreed to buy the heading at "$6.35 per 100 sets, delivered, less New York rates of freight. * * * Terms net thirty days from date of shipment." The correspondence stated, "Rate to New York is 23 cents per cwt.," and that plaintiff should "send invoice, with original bill of lading attached, to this [Daniels'] office immediately after shipment." When the heading was shipped, plaintiff obtained a bill of lading, and forwarded the same, with the invoice, to Daniels. On the trial the plaintiff was permitted to testify that the language in the correspondence, "less New York rates of freight," meant that he should "pay the freight at the

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rate of the New York rates, whatever it may be, and any excess of freight, or anything less than that, is a matter for his [Daniels'] consideration, and not mine. If you please, he might ship a car to Boston, which would take a two cent higher rate of freight than the New York rate. He would simply charge me with the rate at New York, and the excess he would have to pay; and if he was shipping to a point having a less rate of freight, I would have to pay the New York rate." He was also permitted to testify, under objection and exception, that the place of delivery was the place designated by the buyer, which in this case was Liverpool, England. The court below decided, as a matter of law, that the title to the goods had not passed, and directed a verdict for the plaintiff.

The testimony of the plaintiff that, under this contract, the place of delivery was Liverpool, was clearly incompetent. This was simply his construction of the contract. The admission of this testimony is not warranted by *Christopher* v. *Hechheimer*, 127 Mich. 451 (86 N. W. 959), and similar authorities, which hold that ambiguous phrases in contracts may be shown to have a definite and fixed meaning in trade. The testimony in question was not based upon any usage of trade.

Without this testimony, we have a contract of sale at "$6.35 per 100 sets of heading, delivered, less New York rates of freight; terms net thirty days from date of shipment." This language compels us to reach a conclusion contrary to that of the trial judge. It contains nothing to indicate that a delivery to the carrier was not a delivery to the purchaser, and this court has held that "delivery to a public carrier for transportation to the purchaser is, in the absence of circumstances showing a contrary agreement, usually held to be a delivery to the purchaser through his agent, the carrier." *Kuppenheimer* v. *Wertheimer*, 107 Mich. 77 (64 N. W. 952, 61 Am. St. Rep. 317). The same case is an authority negativing plaintiff's claim that, because the purchaser had a right to inspect and reject at New York if the heading did not

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conform to description, the title did not pass on delivery to the carrier at Clare. This case is not, as contended by the plaintiff, governed by the principles of *Lingham* v. *Eggleston*, 27 Mich. 324, where it is stated:

"Where anything is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing, or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of these things is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in a state in which they may and ought to be accepted."

In the case at bar the vendee may reject if the goods do not conform to description, but nothing is "to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods."

Plaintiff relies upon the case of *Miller* v. *Lumber Co.*, 51 S. W. 615, decided by the court of appeals of Kentucky. This case was like the one at bar in this: That an attachment was levied upon a car load of staves in transit to M. S. Daniels, and the case turned upon the question of whether the title passed to Daniels at the beginning or at the end of the transit. The conclusion was reached that "the evidence [which is not set forth] shows that the staves were to be delivered to Daniels at Newark, New Jersey," the end of the transit. Without knowing the evidence which led the court to this conclusion, we can make no use of this authority.

But, in our judgment, this case is not determined by the language of the correspondence respecting delivery. The correspondence contemplated, and there actually was in this case in accordance therewith, a bill of lading procured, which, with the invoice attached, was immediately transmitted to the purchaser. This transfer of the bill of lading passed the title to the property in controversy. *Pease* v. *Gloahec*, L. R. 1 P. C. 219; *Hooper* v. *Robinson*, 98 U. S., at page 538; *Dodge* v. *Meyer*, 61 Cal. 405; *Western Union R. Co.* v. *Wagner*, 65 Ill. 197; Benj. Sales, § 399,

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subd. 7; 1 Mechem, Sales, § 787, subd. 7. It results from these authorities that the title to the goods in question was in Daniels, and therefore that the court should have directed a verdict for the defendants, and not for the plaintiff.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

CRAMPTON v. NEWTON'S ESTATE.

1. EVIDENCE—ADMISSIONS—PROMISSORY NOTES.
   The uncontradicted testimony of a witness that defendant's testatrix told her that she had purchased notes of claimant, and given her own notes in payment, is sufficient to establish such fact.

2. SAME—MARRIED WOMEN—CONTRACTS.
   The undisputed testimony that a married woman received money to the full amount of notes given for it establishes the fact that the contract was one a married woman has power to make.

3. CONTRACTS OF MARRIED WOMEN—PURCHASE OF PROPERTY.
   Promissory notes given by a married woman in payment of the purchase price of notes, though the maker of the latter notes was insolvent, being given for the purchase of property, relate to her separate estate, and are valid.

4. EVIDENCE—CLAIMS AGAINST ESTATES—LEGACY.
   The fact that testatrix left a legacy to her mother is inadmissible to show that the deceased had not purchased notes given by the mother.

5. SAME—MARRIED WOMEN—NOTES—CONSIDERATION—QUESTION FOR JURY.
   Where the uncontradicted testimony shows that a deceased person (a married woman) gave her notes in payment for notes purchased of claimant, the question of a valid consideration for her notes need not be submitted to the jury.

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Error to Genesee; Wisner, J. Submitted October 9, 1902. (Docket No. 28.) Decided January 27, 1903.

Lavina C. Crampton presented a claim against the estate of Grace H. Newton, deceased, based on certain promissory notes. Claimant prevailed before the commissioners and in the circuit court, and William Newton, administrator with the will annexed, brings error. Affirmed.

William Newton, *Black & Roberts*, and *George R. Gold* (*Gilbert R. Lyon*, of counsel), for appellant.

Brennan & Cook (*John J. Carton*, of counsel), for appellee.

HOOKER, C. J. William Newton, administrator, has appealed from the allowance of a claim against the estate of his deceased wife, Grace H. Newton, of whom he and their infant son were the only heirs. The claim consisted of two promissory notes bearing the signature of Grace H. Newton, produced by the claimant, a maternal aunt of the deceased. The validity of the consideration for these notes was questioned, it being claimed that they were void, for the reason that they were given by a married woman without authority of law.

The claimant's attorney called a sister of the deceased, one Jessie Hughes, who testified that Mrs. Frances Hughes, the mother of herself and deceased, executed and delivered to the claimant and her husband, respectively, three promissory notes for money which she borrowed from the claimant. One was dated March 8, 1892, for $328.28, and one for $397.51, dated February 1, 1892, and another for $100, dated December 14, 1887. Grace Hughes married William Newton on December 27, 1892, in accordance with an ante-nuptial contract, whereby he promised to pay her $10,000 at his death if she were then his wife. Jessie Hughes testified further that, after the marriage of Grace, she was told by her that she had purchased from the claimant the aforesaid notes of her mother,

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and had given her own note or notes for them. It was also shown that the Frances Hughes notes were in her possession, and they were found among her papers after her death. The claimant also testified that she loaned money to Frances Hughes, and that she took her notes, before mentioned, therefor. There is evidence tending to show that Grace Newton was an infant at the time her notes were dated, and that was the only question left to the jury. A verdict being found for the claimant, the administrator appealed.

The following errors are assigned as a reason for reversing the order of the circuit court:

1. That there was no evidence that Grace purchased the notes given by her mother.
2. That it does not appear that those notes were valid, for the reason that Frances was a married woman, and it is not shown that she gave them for a lawful consideration, and, if not valid, the notes given by Grace were without consideration.
3. That Grace Newton's notes are not shown to have been given for a lawful consideration, her mother's notes being worthless, and it not appearing that she had any separate estate at that time.
4. That the court should have permitted the introduction of Grace Newton's will, wherein she provided for a legacy of $2,000 to her mother, Frances Hughes.
5. That the court should have permitted the jury to find that no valid consideration was given to Grace Newton for her notes.

The undisputed admission of Grace, that she had purchased the notes of Frances Hughes, established that fact, and justified the judge in so stating to the jury.

The same may be said as to the consideration for the notes of Frances Hughes, it being undisputed that she received the full amount of their face for them from her sister, the claimant. Mrs. Crampton was competent to testify to this, as it does not appear that Grace was present. Even if she were shown to have been present, the testimony of Jessie Hughes establishes the fact, and it is uncontradicted.

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It is settled that the purchase of property is a valid consideration for a married woman's note. A promissory note is property. The fact that the maker may be irresponsible does not change the rule that one buying a note buys property.

The offer of the will to show that Grace had not bought her mother's notes was properly refused. We do not see that the fact that she left her a legacy of $2,000 throws any light upon the subject.

We have already shown that, in view of the uncontradicted testimony that Grace said she bought her mother's notes, giving her notes therefor, the jury should not have been permitted to find that she received no consideration for her notes.

The order of the circuit court is affirmed.

MOORE, GRANT, and MONTGOMERY, JJ., concurred.

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CORLISS *v.* VILLAGE OF HIGHLAND PARK.

1. MUNICIPAL CORPORATIONS — SPECIAL ASSESSMENTS — COUNCILMEN—DISQUALIFICATION.

A member of the common council of a village incorporated under chapter 87, 1 Comp. Laws, who is the owner of land within a special assessment district, is not thereby disqualified from acting with the council in establishing the district and ordering the assessment.

2. SAME—EXCESSIVE ASSESSMENT.

A village sewer assessment, levied under 1 Comp. Laws, § 2856, amounting to 12½ per cent. of the assessed value of the property in the district, is void as to the excess over 5 per cent., which should have been assessed upon the village at large.

3. SAME—INVALID ASSESSMENT—NEW ASSESSMENT.

Where a village council imposed the entire tax upon the property of a special assessment sewer district, in excess of

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the amount permitted by statute, it might correct the irregularity by making a new assessment for the same purpose. Section 2843, 1 Comp. Laws.

4. SAME—POWER OF COURT TO COMPEL NEW ASSESSMENT.
Where sewers have been constructed in a village, and the special assessment therefor is invalid because exceeding 5 per cent. of the value of the property in the sewer district, the court will compel the village council to make a new assessment, and to levy the excess upon the village at large.

5. SAME—VILLAGE COUNCIL—POWER TO BORROW.
Under section 2872, 1 Comp. Laws, a village council may borrow money in anticipation of a special assessment, but not to exceed the amount of such assessment.

6. SAME—SPECIAL ASSESSMENTS—SEWERS—PAVING.
Where under 1 Comp. Laws, § 2856, providing that no assessment for more than 5 per cent. of the valuation of the property in any special assessment district shall be made in any one year for sewers, paving, grading, etc., a small portion of the land included in a sewer assessment district had been also included in a paving assessment district, but the owners of such lands made no objection to the assessment, the court, in ordering a new assessment, refused to deduct the amount of the paving assessment from such per cent. of the value of the property in the sewer district in determining the amount chargeable to the lands of complainant, which were not included in the paving district.

7. SAME—ASSESSMENT FOR PERIOD OF YEARS.
A village organized under chapter 87, 1 Comp. Laws, has no power to extend a special assessment over a period of years.

Appeal from Wayne; Brooke, J. Submitted October 14, 1902. (Docket No. 6.) Opinion filed January 27, 1903. Supplemental opinion February 25, 1903. Rehearing granted April 28, 1903. Reargued May 12, 1903. Former decision affirmed June 15, 1903.

Bill by John B. Corliss against the village of Highland Park and William H. Davison, village treasurer, to restrain the collection of a special assessment. The Detroit Savings Bank intervened as the owner of a warrant payable from said assessment. From the decree rendered, all parties appeal. Modified.

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In 1899 the common council of the village of Highland Park took proceedings to establish sewer district No. 17, and to construct a sewer in the district. The expenses of the sewer were fixed at the sum of $14,531.44, all of which was assessed upon land in the district. Complainant owned property in this district, which was assessed for the construction of this sewer in the total sum of $1,483. The land in this district which fronted on Woodward avenue was also assessed during the year 1899, prior to the proceedings to establish the sewer district, for the sum of $4,475.85, for paving Woodward avenue. The assessed valuation of the property in district No. 17 on the assessment roll of the village of Highland Park for the year 1899 amounted to the sum of $169,003. The lateral sewers in district No. 17 were actually constructed and completed, and the contract for the building of the same was let to George E. Currie. The assessment roll for the paving of Woodward avenue was confined to the lots immediately fronting on Woodward avenue, and it is claimed by the defendants that the sewer assessments were limited to the lots upon the side streets. The assessment roll and the warrant for the collection of such special assessment were duly placed in the hands of the village treasurer, and at the time this bill was filed he was taking proceedings to collect the same. Advertisements asking for bids for the construction of the sewer were published in the Free Press and Detroit Tribune, published in the City of Detroit, Mich. Notices of review of assessments were posted in the village of Highland Park in pursuance of the resolutions adopted by the common council of the village.

About the middle of April, 1900, complainant received a letter from the treasurer of the village of Highland Park, stating that his lots had been assessed for the sum of $1,483.80. He then brought this suit against the village of Highland Park and William H. Davison, treasurer, to restrain the collection of these taxes. After suit was brought, about the 29th of June, 1901, the Detroit Savings Bank filed a petition in the circuit court for the county of

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Wayne, asking leave to intervene in the case, claiming that it was the owner of an order or warrant dated January 27, 1900, issued by the village of Highland Park, to be paid out of the fund to be raised in this assessment district, and on the 29th day of June, 1901, an order was made permitting the bank to intervene as a defendant. The case was tried, and on the 3d of July, 1901, a decree was rendered, which decreed that $1,083 of the said tax was excessive, and it was set aside, and that the complainant should pay into court the sum of $400, with interest at 5 per cent. from the 12th of April, 1900, and that upon such payment the land should be released and discharged from all liability for the cost and expense of the construction of the sewer, and that the defendants be perpetually restrained from collecting said tax. The complainant paid the $400 into court as required by the decree. The defendants appealed from this decree. Complainant is willing to abide by the decree, but, for the purpose of protecting his rights in the case, has also appealed.

Bacon & Yerkes and *C. D. Joslyn*, for complainant.

Wilkinson & Younglove (*James Cosslett Smith*, of counsel), for defendant village of Highland Park.

Sidney T. Miller and *James Cosslett Smith* (*Wilkinson & Younglove*, of counsel), for defendant Detroit Savings Bank.

GRANT, J. (*after stating the facts*). 1. Is the assessment void because two of the members of the common council were owners of land in the assessment district? The law under which the defendant village is incorporated provides that no tax or assessment shall be imposed, or any public improvement ordered, unless by a concurring vote of two-thirds of the trustees-elect. 1 Comp. Laws, § 2752. The council, by appropriate resolution, fixed the assessment district, which included lands belonging to these two councilmen. Then the board of assessors, provided for by section 2832, 1 Comp. Laws, met, made the

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assessment, and reported the same to the common council. The council and the board of assessors met as a board of review. No objection was made to the assessment, and it was unanimously confirmed by the council. If these two councilmen were disqualified, then the assessment is void, because their votes are essential to make the necessary two-thirds. Counsel for complainant insist that they were disqualified, within the principle of the following decisions of this court: *Peninsular R. Co.* v. *Howard*, 20 Mich. 18; *Stockwell* v. *Township Board of White Lake*, 22 Mich. 341; *Wilson* v. *Township Board of Burr Oak*, 87 Mich. 240 (49 N. W. 572); *Locke* v. *Wyoming Township Highway Commissioner*, 107 Mich. 631 (65 N. W. 558); *Lewick* v. *Glazier*, 116 Mich. 493 (74 N. W. 717). They also cite cases from other courts.

None of these cases involve this question. In *Peninsular R. Co.* v. *Howard*, two of the jurors were stockholders of the plaintiff company. In *Stockwell* v *Township Board of White Lake*, a member of the township board was interested in one of the orders involved in the litigation. In *Wilson* v. *Township Board of Burr Oak*, it was held that two members of the board were disqualified because they were interested in laying out the highway in dispute, and had already prejudged the case by expressing their opinions. In *Locke* v. *Wyoming Township Highway Commissioner*, two members of the township board were held disqualified because one had made an affidavit that the highway was a public necessity, and the other had stated that he would decide it as he had done before. In *Lewick* v. *Glazier*, three of the village trustees were stockholders of the electric-light company, which made a contract with the village through the common council.

There is no more reason why the councilmen in this case were disqualified than they would be if the assessment district included the entire territory of the village. Supervisors and assessors of all municipalities are generally taxpayers, and have it in their power to favor them-

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selves in assessing their own property; but this does not disqualify them. *Ex necessitate*, municipal officers must thus be more or less pecuniarily interested. If members of village boards, generally few in number, are disqualified to act in establishing assessment districts because they own land to be affected by an assessment, it would be necessary to make some other provision for determining when and how they should be established. The legislature has never made any other provision, and it is fair to assume that it never contemplated that such officers would be thus disqualified. There is no claim that any member of the board of assessors was interested, or that that board acted improperly in any respect. These two councilmen would naturally be interested in keeping their lands out of the assessing district, but they were placed within it. They had nothing to do with making the assessment. They voted to confirm the report of the board of assessors, whose action is not in any wise attacked. We think they were not disqualified.

2. Section 2856, 1 Comp. Laws, provides that the assessments in sewer districts, etc., "shall not exceed in any one year five per cent. of the assessed value of the property in the district chargeable with such expense." The assessment amounted to 12½ per cent. The court held it void as to the excess of 5 per cent. Section 2835 of the same act provides that "in no case shall the whole amount to be levied by special assessment upon any lot or premises for any one improvement exceed 25 per cent. of the value of such lot or land as valued and assessed in the last preceding tax roll. Any cost exceeding that per cent., which would otherwise be chargeable on such lot or premises, shall be paid from the general funds of the village." These two sections must be construed together. So construed, one fixes the limit to the amount of the assessment; the other fixes the limit which shall be assessed in any one year. No attempt was made to spread it over various years, as was done in *Boehme* v. *City of Monroe*, 106 Mich. 401 (64 N. W. 204). The assessment in that case

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was made under the act for the organization of cities, and it contained a provision that any special assessment might be divided into not more than five annual installments. That provision is not found in the village law. Whether the same result would be reached as in that case, if the common council had provided for annual assessments, is not before us for determination. If the common council desired to raise the money in one year, the only way open to them was to assess 5 per cent. against the landowners, and to assess the balance upon the property of the municipality at large.

3. Section 2833, 1 Comp. Laws, authorizes the council to determine what proportion of the cost of such improvements shall be assessed by special assessment, and what shall be paid from the general funds of the village, or from street district funds. Section 2843 authorizes the common council, in case, in its judgment, any such tax is invalid by reason of irregularity or informality in the proceedings, or if any court of competent jurisdiction shall adjudge such assessment to be illegal, to make a new assessment for the same purpose for which the former assessment was made. The only irregularity consists in attempting to impose the entire tax upon the property of the special district in one year, contrary to the law. We think this is clearly a case where the council is authorized to proceed under this statute to correct the irregularity.

4. The law expressly authorizes the common council to borrow money to make the improvements in anticipation of the special assessment, but not to exceed the amount of such assessment. 1 Comp. Laws, § 2872. The loan from the intervener, the Detroit Savings Bank, is therefore valid.

5. A very small portion of the land in this special assessment district No. 17, fronting on Woodward avenue, was included in the assessment for the pavement of that street, and the cost of that pavement was deducted by the court from the total amount of this special assessment in order to arrive at the amount held to be a proper charge against

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complainant. In this we think the court was in error. Complainant's land was not included in that assessment district. He is therefore not concerned in raising that question. The owners of the land so included are the only ones injured thereby, and they are not here complaining.

Decree will be entered in this court in accordance with this opinion. The case will then be remanded to the court below, with instructions to see that the provisions of the decree are carried out.

HOOKER, C. J., MOORE and MONTGOMERY, JJ., concurred.

SUPPLEMENTAL OPINION.

PER CURIAM. After the opinion in this case was handed down, counsel for all the parties interested filed a stipulation requesting the court to determine whether the assessment might be extended over a period of years, as was done in *Boehme* v. *City of Monroe*, 106 Mich. 401 (64 N. W. 204). This stipulation was complied with, and oral arguments were submitted. We are all of the opinion that the power to extend the taxes for various years is not conferred by the statute. As we said in the former opinion, *Boehme* v. *City of Monroe* was based upon an express statute authorizing such extension. No such provision is found in the village act, and we are not at liberty to infer that it was omitted by mistake. It follows, as stated in the former opinion, that the village council must proceed to assess the excess above 5 per cent. upon the village at large.

ON REHEARING.

GRANT, J. After the former decisions in this case had been rendered, the defendant village applied for a rehearing, claiming that its views as to the legality of the proceedings had not been properly presented to the court, and that the village, under the belief that it was not interested, but that the contest was one virtually between the com-

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plainant, the contractor, and the defendant bank, had intrusted its defense mainly to the counsel for the other parties. Rehearing was granted, and the case has been again fully argued. We see no occasion to change our former opinion. Neither the contractor nor the bank had any contractual relations with the assessment district. The contracts with the contractor and with the bank were both made with the municipal corporation through its trustees. The trustees were clothed with power to order the sewer, to make contracts for its construction, and to borrow the money to build it. The trustees did not exceed their authority. They had power to fix a district, and apportion 5 per cent. upon the assessed valuation in payment thereof, and to assess the balance upon the village at large, or pay it out of its general fund. It must be presumed that the trustees intended to construct this sewer. It was their duty to find out how much they could assess upon the district, and to assess the balance upon the village at large. Those dealing with the municipality under such circumstances had the right to assume that its trustees had acted legally, and had done what the charter authorized them to do. The statute contemplates that a sewer is not alone for the benefit of a locality, but is essential to protect the health of all the inhabitants; else it would not provide that a portion of the expense may be placed upon the village at large.

Under the contention of the complainant, both the district and the defendant village have secured the construction of a sewer without any cost to them. Courts can only sanction such a result when compelled to do so by the inexorable rules of law. It is no new doctrine that municipalities will be compelled to do that which their charters give them power to do. Where the law provided that the board of supervisors of a county owing debts which its current revenue was not sufficient to pay "may, if deemed advisable, levy a special tax not to exceed in any one year one per cent. upon the taxable property," etc., it was held that the law was mandatory, although permissive

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in form; that it was the legal duty of the corporation to levy the tax; and that, whenever the public interest or individual rights called for the exercise of this power, courts would compel action. *Supervisors* v. *United States*, 4 Wall. 435. It was also held in a case very similar to the one now before us that it was the duty of the city to proceed with a new assessment. The court said:

"It is true that, under the contract, petitioner was to be paid from and out of the money to be raised by the assessment, and it is also true that the city did not personally assume the payment for the improvement; but the city did assume the obligation to collect the assessment imposed to pay for the improvement, and that obligation, in connection with the other facts and circumstances in the case, required the city to use all reasonable efforts within its power to make and collect a new assessment to pay petitioner for the labor and materials used in the construction of the improvement, as provided in the contract." *People* v. *City of Pontiac*, 185 Ill. 437, 445 (56 N. E. 1114).

It is also said that, "where a city agrees to pay for certain improvements out of a fund to be raised by assessments upon abutting property, and which the property owners refused to pay, and the city was without authority to enforce, the city is primarily liable." 2 Smith, Mod. Law Mun. Corp. § 1275, and cases there cited; *Commercial Nat. Bank* v. *City of Portland*, 24 Or. 188 (33 Pac. 532, 41 Am. St. Rep. 854); *City of Chicago* v. *People*, 56 Ill. 327.

The principle governing this case was enunciated in *East Jordan Lumber Co.* v. *Village of East Jordan*, 100 Mich. 201 (58 N. W. 1012), where this court, speaking through Mr. Justice MONTGOMERY, said:

"The village has had the benefit of a full performance by the relator; it has ratified, by auditing these bills, a contract which, as we have said, it had the original power to make; and we think, within settled rules, the village is bound to respond to relator."

So in this case the defendant village entered into con-

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tracts with the contractor and with the bank, which it had full authority under the law to make. It has received the full benefit of said contracts. It made a mistake in attempting to assess the whole cost of the public improvement upon a local district. It had power to assess a portion upon the district and the rest upon the village at large. It was a mistake or irregularity which the law authorizes it to correct. Having received the benefits, the law will compel it to do what it has the power to do.

Our former decision is affirmed.

The other Justices concurred.

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F. H. WOLF BRICK CO. *v.* LONYO.

1. EQUITY JURISDICTION—BILL TO QUIET TITLE—BOUNDARIES.
   Where a party is in possession of a tract of land, claiming title, to a line which has been recognized and acquiesced in for the statutory period, equity has jurisdiction to enjoin the owner of the adjoining premises from moving the boundary fence upon the premises so occupied.

2. SAME—EJECTMENT.
   Where a bill to quiet title alleged that defendant moved a portion of the line fence upon the premises, which complainant had occupied under claim of title for upwards of 20 years, and that defendant disputed complainant's title, and defendant, without demurring, answered and took proofs, he could not insist upon the final hearing that he was entitled to have the issue tried in an action of ejectment.

3. BOUNDARIES—ACQUIESCENCE.
   Where a fence has been established and recognized by the adjoining proprietors as on the true line for more than 20 years, such boundary will not be disturbed, although it may not have been originally placed on the true line.

Appeal from Wayne; Hosmer, J. Submitted October 14, 1902. (Docket No. 47.) Decided January 27, 1903.

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Bill by the F. H. Wolf Brick Company against Andrew Lonyo to enjoin the removal of a line fence. From a decree dismissing the bill, complainant appeals. Reversed.

Complainant and defendant own adjoining lands. The bill of complaint alleges that the line fence between them has been established for more than 20 years; that complainant purchased its land in 1886; that the line fence was then worn out and broken down in some places, and it erected another fence in place thereof; that such fence has remained ever since, and been recognized by the parties as the true line; that on July 17, 1901, defendant attempted to tear down this fence, and did in fact tear down about 100 feet thereof, with the intention of erecting a new line fence 6 feet easterly of the old fence; that complainant is informed that defendant claims that the true line commences at a point 6 feet east of the present line fence; that complainant immediately notified defendant of its rights, and not to interfere with or move the fence. The prayer is for a perpetual injunction against the defendant, prohibiting the removal of the fence. The bill was filed July 18, 1901.

Defendant answered, denying all the material allegations of the bill; alleging that said fence was not on the line; that it had been moved, removed, shifted, and rebuilt a number of times; that some of the ground (removed for the purpose of making brick) had been taken away, and the fence rebuilt, "but not upon any line that had been established by survey, agreement, or otherwise." The answer further admits that the defendant did, on July 17th, tear down a part of said fence near the south end, and erect the same upon what he claimed to be the true line, and that he intended to take up all the old fence, and place it upon the line which he claimed to be the true one.

Replication was duly filed, and proofs taken in open court. The court did not pass upon the merits of the controversy, but dismissed complainant's bill upon the sole ground that the jurisdiction of a court of equity had not been properly invoked by the complainant.

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Edwin F. Conely and *Orla B. Taylor*, for complainant.

Richard I. Lawson, for defendant.

GRANT, J. (*after stating the facts*). 1. The court did not find that complainant was not in possession, but dismissed the bill upon the sole ground that there was a dispute as to the boundary line, which should be tried in a suit at law. That complainant was in possession on the 17th day of July, when defendant commenced to remove the fence, is clearly established by the evidence. It, being in possession, could not bring an action of ejectment; the defendant could. It was his clear duty to do so, rather than to attempt by force to remove this old fence to the line which he claimed. *Wilmarth* v. *Woodcock*, 66 Mich. 331, 336 (33 N. W. 400). Complainant was under no obligation to stand by, see the defendant build the fence upon another line, and then bring an action of ejectment. Defendant could not prevent complainant from maintaining this action by the removal of a small portion of the fence. It invoked the aid of the court to restrain this unjustifiable action on the part of the defendant as soon as it learned that he had commenced such removal. It moved seasonably. The right to maintain this action is clearly sustained by the following decisions of this court: *Stewart* v. *Carleton*, 31 Mich. 270; *Wilmarth* v. *Woodcock*, 58 Mich. 482 (25 N. W. 475); *Vier* v. *City of Detroit*, 111 Mich. 646 (70 N. W. 139); *Campbell* v. *Kent Circuit Judge*, 111 Mich. 575 (70 N. W. 141). In *Campbell* v. *Kent Circuit Judge*, in an opinion by my Brother MONTGOMERY, the cases relied upon by the defendant to sustain his contention are distinguished from cases like this.

Counsel for defendant cites and relies upon *Bresler* v. *Pitts*, 58 Mich. 347 (25 N. W. 311), and *Andries* v. *Railway Co.*, 105 Mich. 557 (63 N. W. 526). In *Bresler* v. *Pitts* the express object and prayer of the bill were to settle the boundary lines of complainants' estate. The bill

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alleged that "the location of the 40-feet line [the line in dispute, described in the deed as "a line 40 feet above the border of the river at high-water mark"] is uncertain, and difficult of determination, and that the parties dispute their boundaries." It was properly held that a bill in equity will not lie for the sole purpose of settling disputed boundaries.

Andries v. *Railway Co.* is a similar case. The main object of the bill was "to establish the line where the fence is as the true line." No doubt in fact existed as to the location of the true line. Two former suits brought to this court involving the issue had settled the true boundary line against the contention of the complainant. *City of Detroit* v. *Railroad Co.*, 23 Mich. 173; *Tapert* v. *Railway Co.*, 50 Mich. 267 (15 N. W. 450). The other lot owners had built their fences in accordance with those decisions. The railway company not only had not acquiesced in this fence as the boundary line, but had always disputed it.

The language of those cases applies where a boundary line is sought to be established, and not where a party is in possession, claiming as owner, with the line surveyed as the original line recognized and acquiesced in as the true line for from 20 to 30 years. The rule of those cases applies where there is a well-recognized dispute as to the true boundary line, and the purpose of the bill is to ascertain and establish it. Under the allegations of this bill, as well as the proofs, there never was any such dispute until the defendant undertook to remove this fence by force, and thus compel the complainant to resort to the law when he himself was in position to bring a suit at law in an orderly and proper way if he chose to do it. To give defendant such a right would be a reproach to the law. This case comes clearly within the statute.[1]

2. Complainant's bill showed that defendant disputed complainant's title. If he denied the jurisdiction of the court to test the question, it was his duty to demur to the

[1] 1 Comp. Laws, § 448.

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bill. By answering, he voluntarily submitted this question to the court, and cannot now be heard to deny its jurisdiction. *Stockton* v. *Williams*, Walk. Ch. 120, 127. Where possession is alleged, and is denied by the answer, a question of fact as to possession is presented, and we do not hold that in such a case, if the evidence should disclose that complainant was out of possession, a suit in equity could be maintained.

3. It is unnecessary to go into details upon the merits. We are entirely satisfied that complainant has proved by a clear preponderance of evidence that the fence had been established and recognized by both parties as on the true line for a period of more than 20 years. Whether this fence was originally established upon the true line is a question foreclosed by the acquiescence of the parties.

"A long-established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments of the original survey have disappeared."

"Long practical acquiescence in a boundary between the parties concerned may constitute such an agreement on it as to be conclusive, even if it had been erroneously located." *Diehl* v. *Zanger*, 39 Mich. 601.

See, also, *Husted* v. *Willoughby*, 117 Mich. 56 (75 N. W. 279), and authorities there cited.

The decree is reversed, with costs, and decree entered in this court for the complainant.

HOOKER, C. J., MOORE and MONTGOMERY, JJ., concurred.

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PURVIS v. SEGAR.

INTOXICATING LIQUORS — ILLEGAL SALES — DAMAGES — COSTS.

Section 5399, 2 Comp. Laws, gives a plaintiff the right to recover costs in a civil action begun in the circuit court for the illegal sale of intoxicating liquors, although the damages awarded are less than $100.

Error to Gratiot; Stone, J. Submitted October 16, 1902. (Docket No. 78.) Decided January 27, 1903.

Case by Charles E. Purvis against James A. Segar and others for the illegal sale of liquor to plaintiff's minor son. From a judgment for plaintiff, but awarding costs to defendants, plaintiff brings error. Reversed.

Searl & Kress, for appellant.

John T. Mathews, for appellees.

MONTGOMERY, J. The only question presented in this case is which party is entitled to costs in a suit under the civil-damage act, originally instituted in the circuit court, in a case where the recovery is for $100 or less. The circuit judge was of the opinion that the general statute as to costs governed the case, and awarded the costs to defendants. Plaintiff brings error.

In *Dikeman* v. *Harrison*, 38 Mich. 617, which was an action by the wife for damages for sales made to her husband, the court held that, as there was no special statute relating to such a case, the general statute governed, and, as the recovery was for precisely $100, costs were awarded to the defendant. The court said:

"The case is a hard one, and we cannot but think the legislature would have exempted it from this rule if the matter had been brought to their attention."

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When the case of *Dikeman* v. *Harrison* arose, there was a statute (Act No. 92, Pub. Acts 1877) which contained the same provision as to actions for damages for sales to minors as is now found in the general statute, hereinafter quoted; but this statute was, of course, not considered in that case. The present statute (2 Comp. Laws, § 5399) reads:

"The damages in all cases arising under this act, together with costs of suit, shall be recoverable in an action of trespass on the case before any court of competent jurisdiction."

In *Theisen* v. *Johns*, 72 Mich. 285 (40 N. W. 727), Mr. Justice LONG construed this statute to mean:

"Where the claim for damages alleged in the declaration shall bring the case within the jurisdiction of a court of record, if the plaintiff is entitled to recover at all, he shall at least recover a minimum amount fixed by the statute, and, in addition thereto, his costs of suit."

It may be said that this language was not necessary to a decision of the case. Nevertheless, it was used in an interpretation of the statute, and evidently fully considered. Moreover, it has undoubtedly been since acted upon by the courts of the State. As this decision was handed down in 1888, we should hesitate to overrule it, even if it were of more doubtful accuracy; but, considering the state of the law when *Dikeman* v. *Harrison* was decided, and the expressions of the court with reference to it, we think the inference that this statute was designed to remedy a recognized evil is a fair one, and that Justice LONG correctly interpreted the statute.

Judgment reversed, and judgment entered here for costs of both courts in favor of the plaintiff.

HOOKER, C. J., MOORE and GRANT, JJ., concurred.

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FLAWS v. WEST BAY CITY SHIPBUILDING CO.

NEGLIGENCE— FELLOW-SERVANTS— DEFECTIVE TOOLS—EVIDENCE.

Plaintiff, while working in defendant's shop as a puncher, was injured by the fall of a sheet of steel. He claimed that the fall was due to a nut fitting loosely to a bolt, which the foreman of the gang in which plaintiff was working obtained from the foreman of another gang. The latter had picked it up from the floor of the shop, and used it for holding up light plates. *Held*, that there was no sufficient evidence that defendant had furnished the defective tool to plaintiff for use, and the negligence, if any, was that of a fellow-servant.

Error to Bay; Shepard, J. Submitted November 19, 1902. (Docket No. 108.) Decided January 27, 1903.

Case by William Flaws against the West Bay City Shipbuilding Company for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Defendant is a shipbuilder, owner of a large plant, and employs a large number of men. It manufactures and uses steel plates weighing from 150 to 1,600 pounds. It is necessary to trim these plates. For this purpose they must be raised about three feet from the ground. This process is called "punching," and those who do it are called "punchers." A punch gang consists of five men, the chief of whom is known as the "chief puncher" or "boss," or, as some of the witnesses called him, "foreman." Various methods are employed for raising the plates. The one used in this case was to put a bolt through a hole near the center of the plate, screw a nut on the end of the bolt on the under side, attach the bolt to the crane, and raise the plate. When raised, the men guide it, placing the appropriate part under the punching machine to accomplish the work. The plate in this case was one of

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the heaviest in use, weighing 1,500 to 1,600 pounds. The plate had been raised and partially trimmed, when, for some reason, the nut came off the bolt, and the plate fell, the end striking the plaintiff at his ankle, and seriously injuring him.

The only charge of negligence relied upon was that the nut was too large for the bolt. The bolt was procured and identified. A nut was also produced, and claimed to be the nut then used. The eyebolt was three-fourths of an inch in diameter, and the nut produced was thirteen-sixteenths of an inch in diameter,—one-sixteenth of an inch larger than the bolt.

These punching machines, called "punches," are situated in what is called the "punch shed." There were 13 of the punches in this shed, and 3 shearing machines. The punch shed had its foreman, as also did the other shops.

One Ribble was the boss or foreman of the plaintiff's gang. When ready to raise the plate, Ribble went to one Dee, the boss or foreman of another gang, and asked for a bolt he had with a ring in it. Dee loaned him the bolt which was used. Dee had used this bolt twice to raise plates of only 150 pounds. Ribble took the bolt and nut, and, before fastening it to the plate, screwed the nut on and off, and testified that it fitted closely. Dee testified that he had had this bolt in his possession for about a month; that he had the ring put in it about two weeks before the accident; that he picked the bolt up from the floor; that he did not know how long it had been in the punch shed; and that he used it twice before the accident on very light plates. Mr. Ribble did not tell Dee how heavy a plate he was to raise. Dee had the ring put in because the eye of the bolt would not go on the hook of the chain fall. It was customary to throw the bolts on the floor after they were used. Dee did not know how long this bolt had been in use.

When the plaintiff rested his case, the court directed a verdict for the defendant on the ground that:

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"There is no sufficient proof that the defendant furnished the particular tool to the plaintiff to use, or to his associates, in the condition in which it was when the injury happened. If there was any negligence, it was the act of a fellow-servant in using the tool. The foreman of the gang where the plaintiff worked went to a distant department, picked up a tool that he thought was sufficient for his purpose, such a one as had been used by the other employé for his purposes, which might be the handling of a lighter sheet of steel, but which seems to be inadequate and insufficient and unsafe for the purposes or use to which it was here put. There is some evidence also that more safety and more security could have been insured in the plaintiff and his co-employés in performing their work; but they used the eyebolt in question, and the injury resulted under such circumstances that I do not think the defendant can be held liable for the injury, and therefore your verdict will be for the defendant."

Loranger & Flynn, for appellant.

Simonson, Gillett & Clark, for appellee.

GRANT, J. (*after stating the facts*). In my opinion, the record is barren of any evidence identifying the nut produced in court and screwed upon the bolt as the one used at the time of the accident. No witness even referred to the nut. They identified the bolt solely by the ring. The nut evidently came off with great force. Six or seven hours after the accident, some one brought the bolt to the plaintiff at his house, with a nut screwed upon it. Ribble, plaintiff's own witness, and the foreman of the gang, testified that, in his opinion, the nut produced in court was not the one used, because he screwed the nut on and off, and it fitted perfectly tight, while the one produced in court was too large.

My Brethren, however, are of the opinion that the case should be affirmed for the reason given by the circuit judge in directing a verdict. We are all of the opinion that the instruction was correct. The declaration, besides alleging as negligence that a bolt of insufficient size was used, also alleges that the threads of the bolt were badly

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worn, were weakened by work and use, and that the defendant's employé in charge of its toolhouse gave out to its workmen this bolt of insufficient size. Either defect might produce the result, but that of insufficient size is alone relied upon. Bolts and nuts of different sizes were used in the defendant's plant. The theory of the plaintiff is that this bolt was in good condition for use with a proper nut, and the nut was in good condition for use with a proper bolt; that some employé made a mistake in selecting the one or the other, and for this mistake the employer is liable. Dee had this bolt fixed to accommodate himself in raising light weights, and selected the nut. Mr. Ribble borrowed it to raise a weight nearly equal to the full tensile strength of a nut and bolt properly fitting each other. It required no great skill to determine whether the bolt and nut corresponded in size, and plaintiff's foreman and fellow-servant made a careful examination, and determined that they did. Defendant was under no obligation to keep a man in each room of its establishment to see that its employés used the proper tools. It had furnished safe tools and competent workmen to select and use them, and had thus performed its full duty towards its employés. *Wachsmuth* v. *Electric Crane Co.*, 118 Mich. 275 (76 N. W. 497). If there was negligence, it was that of a fellow-servant.

Judgment affirmed.

HOOKER, C. J., CARPENTER and MONTGOMERY, JJ., concurred with GRANT, J. MOORE, J., concurred in the result.

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DAY v. DAVEY.

1. TAX TITLES—BILL TO QUIET TITLE—POSSESSION—FRAUD.
   The owner of the original government title to land, although not in possession, may maintain a bill in chancery to cancel tax deeds purchased by one in possession under an agreement with the owner to pay the taxes, on the ground that the title was bought in complainant's interest, and held by fraud.

2. SAME—EVIDENCE.
   The evidence is *held* to be sufficient to show an arrangement that the tax deeds should be purchased in the interest of the original owner, provided it shall be made to appear that the agent purporting to represent the original title was in fact the representative of the owner.

3. SAME—OMISSION OF EVIDENCE—REMANDING CASE.
   The complainant having, through an oversight, omitted to show the fact of such agency, the case was remanded for the purpose of permitting him to supply the proof.

Appeal from Newaygo; Palmer, J. Submitted November 21, 1902. (Docket No. 120.) Decided January 27, 1903.

Bill by George A. Day against Egbert A. Davey and Alice L. Davey to set aside certain tax deeds. From a decree for complainant, defendants appeal. Remanded, with leave to complainant to supply proof.

A. G. Day, for complainant.

Martin Rozema, for defendants.

MONTGOMERY, J. This is a bill to have certain tax titles held by defendant Egbert A. Davey declared void as against the title of the complainant. The bill alleges and the evidence shows that the complainant is the owner of the original government title. In March, 1897, Davey became the purchaser of tax titles for the years 1892 and

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1893. The bill alleges that prior to April, 1896, the Home Guaranty & Trust Company owned the land covered by said tax titles, and by its agents employed one F. J. Covell and said Davey to cut the timber from the land, sell it, and use the money realized therefrom in paying up the back taxes on said land; that, under and by virtue of said employment and agency, the said Covell and Davey entered upon said land, cut and removed certain timber, sold the same for money, received the money therefrom, and bought in the tax titles aforesaid in their own name with the money received from the sale of the timber cut by them from the land by virtue of their confidential employment, and have ever since been in possession, in fraud of the rights of the Home Guaranty & Trust Company and its grantees, and that said Davey is now in possession by virtue of said fraudulent purchase, and has no other rights; and that said tax titles are void in the hands of the defendants in a court of equity, as against the Home Guaranty & Trust Company and its grantees. The bill further alleges that the defense and objections to the tax titles, based on these confidential relations, cannot be made in a court of law, and are only cognizable in a court of equity. The circuit judge, upon the proofs made, granted the relief asked, except as to one description of land, which the complainant by his bill offered to release to Davey. The defendants appeal.

The contention of defendants is that this bill cannot be maintained as a bill to quiet title, for the reason that it does not aver that the complainant is in possession, but, on the contrary, avers possession in defendants. This contention is strictly correct, so far as it relates to an attempt to try the validity of the tax titles by alleging defects in the proceedings; but such is not the scope of the present bill. This is a bill more properly to declare a trust. The case falls within *Jones* v. *Smith*, 22 Mich. 360. Where the bill brings the case within some other head of equity jurisprudence, possession by complainant is not essential to jurisdiction. The complainant's right to attack these tax

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titles is an equitable right. On the face of the record the title is in defendant, but the theory of the complainant is that the title was bought in in complainant's interest, and that defendant now fraudulently asserts a legal title to which complainant is equitably entitled. A resort to equity seems necessary to establish this right.

It is contended by defendants that there is no such proof of the arrangement between Covell and the representative of the original title as entitles complainant to assert the claim made. Without setting out the testimony at length, we think the inference that the circuit judge drew justified, viz., that the representative of the original title was given to understand that this title would be purchased in in the interest of the owner of such title, and that the defendant Davey was aware of this arrangement, and took his deed subject to it. The above statement is upon the assumption that the agent purporting to represent the original title shall prove to be and have been the representative of the owner at the time of the transaction in question. The testimony of complainant's witness was to the effect that he represented one Calvin E. Brown as the owner of the original title. The connection of Calvin E. Brown with the Home Guaranty & Trust Company is not made to appear by the testimony. There are indications that this was an oversight on the part of complainant.

The question is presented whether we should reverse this decree without prejudice, or whether another course would not better meet the exigencies of the case. We are disposed to direct that the case be remanded, with leave to complainant to supply the proof showing that Calvin E. Brown was in some way the representative of the Home Guaranty & Trust Company at the time this contract made between Draver, complainant's witness, and Covell was entered into; and, on such testimony being adduced, the case may be brought to hearing at the circuit. The appellants will recover the costs of this appeal.

The other Justices concurred.

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McBRIDE *v.* SCOTT.[1]

JOINT TORTS—RELEASE.

A release of one or more joint tort feasors releases the others, although it be agreed that they shall not be discharged.

Error to Wayne; Rohnert, J. Submitted December 3, 1902. (Docket No. 142.) Decided January 27, 1903.

Case by Joseph McBride against John Scott, Arthur Scott, and Maxwell H. Grylls (copartners as John Scott & Co.), Alexander Chapoton, James M. Wood, and others, for injuries caused by the collapse of a building. From a judgment for defendants on demurrer to the replication to their plea *puis darrein continuance*, plaintiff brings error. Affirmed.

S. E. Engle, for appellant.

Earl D. Babst and *Otto Kirchner*, for appellees John Scott & Co.

Brennan, Donnelly & Van De Mark, for appellees Chapoton and Wood.

Walker & Spalding, for other appellees.

MONTGOMERY, J. The plaintiff brought this suit against a large number of defendants. The defendants demurred to the declaration. Judgment passed for the defendants. The case was appealed to this court, reversed, and remanded. 125 Mich. 517 (84 N. W. 1079). At this stage of the proceedings two of the defendants, Moore and Wiggins, paid to the plaintiff $1,507.68, and were given a release in the following terms:

"*Whereas*, the Supreme Court has held that in the various Wonderland cases all the defendants were liable

[1] Rehearing denied May 29, 1903.

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upon the allegations in the plaintiff's declaration; and *Whereas*, James H. Moore and Enoch W. Wiggins are desirous of settling for their own individual liability, and to be therefore released from any further liability as to themselves personally; and they having paid to me the sum of $1,507.68, to be applied upon my claim for damages in this cause, I do hereby release the said Moore and Wiggins from all further liability, but reserving distinctly and expressly all my rights and claims against each and all of the other defendants for any and all sums, in addition to the sum above paid, which I may be found entitled to. In other words, it is distinctly understood that no rights whatever are released as against the other defendants, and that the only benefit they may or shall receive by reason hereof is such as allowed by law in giving to them the benefit of the sum above paid by way of reduction *pro tanto* of the damages for which this suit was brought.

"The said Moore and Wiggins, in further consideration hereof, agree each to attend and give his testimony when called upon by due legal subpœna, and to furnish such plans, specifications, contracts, deeds, or other documents of any description whatever which may be required upon the trial relating to the matter in this suit, should the same be within their possession or control."

The case was thereupon discontinued as to Moore and Wiggins. The other defendants interposed a plea *puis darrein continuance*, setting up this discharge of Moore and Wiggins as a bar to the action. The replication to this plea set out the agreement above quoted. The defendants demurred to the replication. Judgment passed for defendants on the demurrer, and the plaintiff brings error.

The question is very clearly presented by the record as to whether a discharge of one or more of numerous joint tort feasors is a bar to a further action against the remaining tort feasors in a case where the plaintiff in form reserves the right to proceed against the remaining tort feasors, and where the plaintiff does not acknowledge full satisfaction for the wrong complained of. The question never has been directly determined by this court, and it is not free from doubt. In 8 Bac. Abr. (Bouv. Ed.) tit. "Release," p. 277, it is said:

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"If divers commit a trespass, though this be joint or several, at the election of him to whom the wrong is done, yet, if he releases to one of them, all are discharged; because his own deed shall be taken most strongly against himself. Also, such release is a satisfaction in law, which is equal to a satisfaction in fact."

That such is the effect of a bare release at the present day, plaintiff's counsel concedes. But it is urged that, as the plaintiff had the right originally to proceed against one or all of the wrong-doers until full satisfaction is obtained, no one of the defendants has a right to complain of any arrangement made with his co-defendant for an adjustment of the plaintiff's demand as against such co-defendant, unless either by a formal release under seal, which conclusively imports full satisfaction, or full satisfaction in fact. And authorities are not wanting which sustain this contention. On the other hand, it is contended that the discharge of one of several tort feasors amounts *in law* to a satisfaction of the plaintiff's demand, and this without regard to the question of whether the release be by instrument under seal or by parol agreement.

One of the earliest American cases upon the subject is *Ruble* v. *Turner*, 2 Hen. & M. (Va.) 38, in which several had been guilty of an assault. An agreement, not under seal, was made between the plaintiff and one defendant, by which satisfaction was acknowledged for the part which such defendant took, and an attempt was made to reserve the right as to the other defendants. The court held this reservation inoperative, Mr. Justice Tucker saying:

"It is a rule of construction that, if there be any clause or condition in a deed which is either contrary to law or repugnant to the nature of the estate created, it is void. Now, here the question is whether, by the first clause in this instrument of writing, Joel Motley was thereby discharged, and the plaintiff barred of his action against him; and I hold that he was, for the reasons already given. What, then, is the effect of this? The *law* says that if one joint trespasser be released, or make accord and satis-

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faction, it shall bar a recovery against all the others. The plaintiff can no more change the law in this particular by any subsequent proviso or condition than he could, after a grant in fee simple by deed, restrain his grantee from selling the lands, or change the course of descents prescribed by law; neither of which will it be contended that he could do. The proviso, then, is merely void, and cannot prevent the legal effect of the accord and satisfaction made by one of the defendants."

In 9 Bac. Abr. (Bouv. Ed.) p. 547, appears the following:

"Trespass against five. The plaintiff accepts a note from two, for a sum to be paid at a future day, in satisfaction as to them, but not to operate as a satisfaction as for the other defendants. The right to recover damages is gone as to all."

In *Ellis* v. *Bitzer*, 2 Ohio, 89 (15 Am. Dec. 534), it appeared that there were several joint defendants. A note was executed, of which the court said it was executed and received with the intent and for the purpose of discharging Williams and Adkins, the makers, from all further liability on account of their being jointly concerned with the defendants in the trespass, but with the express stipulation that it should not discharge the other co-trespassers. The court said:

"An accord and satisfaction of a joint trespass by one is good for all concerned. The act of one of several joint trespassers is the act of all. They all unite to do an unlawful act, and each is responsible for the acts of the others. The plaintiff may elect to sue them jointly or separately, and may pursue them until he has obtained satisfaction; but he can have but one recompense in damages for the same injury. The plaintiff here agreed to take the note of Williams and Adkins, two of the trespassers, for $150, and to forbear to sue them; the note was given, and it was understood they were fully discharged; and he has thus made his election, not only as to the amount he would receive as a recompense for the injury he sustained from the assault and battery committed by the defendants jointly with Williams and Adkins, but also of the persons from whom he would recover that recom-

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pense. * * * The accord and satisfaction mentioned in the third plea operated in law as a discharge of these defendants from liability for the injury complained of by the plaintiff, and it was not in the power of other persons to deprive them, by any agreement of theirs, of the benefit of this legal discharge."

Brown v. *Kencheloe*, 3 Cold. 192, was decided in 1866. In this case the record does not clearly show a distinct reservation of the right of action as against the other wrong-doers, but it discloses a settlement and discharge of several of the joint tort feasors, and it was held that a discharge of one discharged all. To the same effect is *Gilpatrick* v. *Hunter*, 24 Me. 18 (41 Am. Dec. 370). See, also, *Gunther* v. *Lee*, 45 Md. 60 (24 Am. Rep. 504).

The plaintiff cites *Bloss* v. *Plymale*, 3 W. Va. 393 (100 Am. Dec. 752). In this case there were several joint wrong-doers, and a receipt was given to one in full of all dues, debts, and demands to date. The court declined to follow *Ruble* v. *Turner*, *supra*, and, basing its decision upon *Herrington* v. *Harkins' Adm'rs*, 1 Rob. (Va.) 591, held that the payment did not discharge the other wrong-doers.

The case of *Matthews* v. *Manufacturing Co.*, 3 Rob. (N. Y.) 711, is much relied upon. In this case there was a reservation in the following words:

"It being expressly understood and agreed that I do not hereby release or prejudice any claim, suit, or demand which I may have against any other person or persons or corporation for any matter or thing arising out of, or connected with, or relating to, any shipment or consignment," etc.

The court held that this release of one joint wrong-doer did not discharge the other defendant. The value of this case as an authority is much impaired by a decision of the appellate division of the supreme court of New York in *Brogan* v. *Hanan*, 55 App. Div. 92 (66 N. Y. Supp. 1066). This was a case in which the question was directly presented. There were several joint trespassers. The defendants pleaded release to Duncan, a co tort feasor. The

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release of Duncan was read in evidence, and plaintiff reserved therein all right of action and claim for damages for negligently causing the death of plaintiff's intestate against the defendants and all other persons who controlled the premises. The court held this release to be a bar, because the defendants were joint tort feasors.

The authority of *Matthews* v. *Manufacturing Co.* was also directly questioned in *Mitchell* v. *Allen*, 25 Hun, 543. In that case three were sued for negligence. One was discharged upon payment of $285, but with a stipulation reserving the right of action against the other defendants. It was contended that this release did not amount to a discharge of the other defendants, for the reason that it was not a technical release under seal; the plaintiff relying upon *Matthews* v. *Manufacturing Co.* The court say of *Matthews* v. *Manufacturing Co.*:

"The record of the case is meager. Neither the nature of the action nor the contents of the release are stated."

The court further say:

"This stipulation, not being under seal, cannot operate as a release, but it acknowledges a payment from Markham, for which it releases him from further claim of the plaintiff. So far as he is concerned, the stipulation was an accord and satisfaction for the tort. There is no doubt that the plaintiff is entitled to but one satisfaction for her injury. It is not necessary that this satisfaction be by way of a judgment, and satisfaction from one party discharges the others. The plaintiff, not seriously denying all this, insists that her discharge of Markham arises solely out of her contract, and can extend no further than the express provision of the contract will permit. But, while Markham was discharged from his liability by the contract, the discharge of Allen and Porter arises as a necessary legal result from the satisfaction by and discharge of their joint tort feasor. When Markham was discharged, the action as to them was barred as a matter of law, and no contract between plaintiff and Markham can prevent the legal effect of his satisfaction."

Another case which, to a certain extent, supports the contention of the plaintiff, is *Ellis* v. *Esson*, 50 Wis. 138

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(6 N. W. 518, 36 Am. Rep. 830). The opinion is by Mr. Justice Taylor, and, because of his great ability, is entitled to considerable weight. He rests his decision, however, in part upon the case in 3 Rob. (N. Y.), which, as we have seen, has not been followed by the courts of New York. Furthermore, the court in *Ellis* v. *Esson* distinctly reserve the question as to the effect of a release of one tort feasor with a reservation of the right of action as against the others "in an action for assault and battery, false imprisonment, or similar actions," such as the present, "in which the damages rest mainly in estimation and opinion." This reservation in the opinion of the court upon this subject detracts very materially from the force of the case as an authority, for it is difficult to conceive in principle how any such distinction can be drawn. If the discharge of one tort feasor, as matter of law, operates to discharge his co tort feasor in any case, we are not able to see how the question of difficulty in establishing the exact damages can affect the holding in the particular case.

We are of the opinion that the better rule is that contended for by defendants in this case; that to admit of a settlement with one tort feasor under such circumstances as are here presented, and to hold that a reservation such as is here attempted saves the right as to other tort feasors, would open the door for the plaintiff in any case to acquire by successive settlements more than just compensation; or, as is said in *Brown* v. *Kencheloe*, *supra*, "The plaintiff in many instances would operate upon the fears of the defendants, and get from each full damages for the trespass committed."

The judgment will be affirmed, with costs.

HOOKER, C. J., MOORE and CARPENTER, JJ., concurred. GRANT, J., did not sit.

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BERLIN v. WILLIAM B. MERSHON & CO.

MASTER AND SERVANT—NEGLIGENCE — DANGEROUS MACHINERY — WARNING TO CHILDREN.

Where the testimony shows that a boy 16 or 17 years of age, who was injured in the cogwheels of a planer while waiting for the foreman to adjust the machine, had worked with the planer until he knew its manner of operation and the danger from the cogwheels, no recovery for the injury against his employer can be based upon a failure to warn him of the danger.

Error to Saginaw; Snow, J. Submitted December 5, 1902. (Docket No. 45.) Decided January 27, 1903.

Case by August Berlin, by next friend, against William B. Mershon & Company, for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

Humphrey & Grant, for appellant.

Wilber & Brucker and *Fred L. Travers*, for appellee.

MOORE, J. The plaintiff recovered a judgment against the defendant for personal injuries received while in its employ. At the close of the testimony, a request was made that a verdict be directed in favor of defendant. This request was refused. A good many assignments of error were made and argued by counsel, but the important question is whether a verdict should have been directed as requested.

The plaintiff was at work upon a planing and matching machine at the time of the injury. There is a dispute as to his age at that time. He claims he was but 16 years and 3 months old. The defendant claims he was 1 year older. The machine upon which he was hurt was known as a "Schenck Machine." Four of them were in use in the building where plaintiff was employed. A pho-

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tograph of it is before us, which gives a better idea of its construction than it is possible to give in words. This machine had been in use several years. There is no claim that it was out of order, but it is claimed that, because certain cogwheels were uncovered, it was a dangerous machine, and that, because of the tender years of plaintiff, he should have been warned of the danger.

This machine was used for planing and matching lumber varying in length from 18 inches to upwards of 12 feet long. The bed of the machine was 9 inches wide. The boards to be planed or matched were put upon the bed of the machine, where they were engaged by two rollers which were driven by cogwheels, and carried forward to other rollers and knives, which did the planing or matching. One board was followed in close succession by another. Between the bed of the machine and its frame was a space of 9 inches. When boards shorter than 4 feet were to be planed, the person feeding the machine put a bag filled with sawdust, or some article of clothing, upon the bed of the machine, to serve as a cushion, and sat upon it, astride of the bed of the machine, with his legs hanging between the frame of the machine and its bed. The operator then took the short boards from a table at his left hand, where they were placed by another employé, put them upon the bed of the machine immediately in front of him, and pushed them forward until they were engaged by the rollers and carried forward; one board quickly following another. The cogwheels where the injury occurred were at the right end of the rolls, and between the bed of the machine and its frame. They were from 7 to 9 inches in diameter, and in plain view. They revolved in such a way that, if the operator got his fingers between them from the side nearest him, instead of his hand being drawn between the cogwheels it would be thrown away from them.

The accident occurred January 15, 1900. It is shown by the testimony of the plaintiff that in April, 1897, he presented to the defendant a letter, the contents of which

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he knew, signed by his father, asking that he be given employment, and stating he was 14 years old the 2d day of the previous October. He was given employment in and about the planing mill, and continued to work for the defendant until the accident,—a period of 2 years and 9 months. About 8 or 9 months before the accident, he was put at work upon the planer, where he was hurt, planing or matching lumber running from 4 feet long to upwards of 12 feet, and worked there steadily until the accident, except when boards shorter than 4 feet were run through the machine, when he changed off with an older brother, who ran a planer next to this one, and in plain view of it, so that he could see how his brother did the work, if he looked.

On the morning of January 14th, plaintiff was put at work shoving 18-inch boards through the machine, and worked eight hours that day. On the morning of the 15th he worked about a half hour, when he ceased pushing boards through the machine, to enable Mr. Piker to change the machine so that wider boards might be run through it. The plaintiff continued to sit upon the bed of the machine, and in some unaccountable way his hand was caught in the upper or back part of the cogwheel, and three fingers were badly crushed. His version of how it occurred is as follows:

On the direct examination:

"*Q.* Tell the jury, as near as you can, how you got hurt.

"*A.* My hand got up there suddenly, and catched in there some way.

"*Q.* Got between those cogs?

"*A.* Yes. I cannot tell just how it was. When I was at work my hand caught in there some way; came in contact with it."

On the cross-examination he said:

"*Q.* How did you get your hand in that place in operating that machine?

"*A.* Why, caught it in there some way.

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"*Q.* How did you get it in there in pushing the boards into that machine?

"*A.* I was not pushing the boards through.

"*Q.* In pushing the boards into that machine, it wasn't possible for you to get your hand in there, was it?

"*A.* No, sir.

"*Q.* What were you doing when you got your hand caught clear over the outside of this cog in there?

"*A.* Do you mean what I was at work at?

"*Q.* What were you doing to get your hand in that position and get it caught?

"*A.* We were changing the machine. * * *

"*Q.* What were you doing while he was changing the machine?

"*A.* Sitting there.

"*Q.* Then you were doing nothing, were you not, at the time?

"*A.* Yes.

"*Q.* Well, now, how did you get your hand in there?

"*A.* I was so excited I could not tell.

"*Q.* You were so excited you could not tell anything about it?

"*A.* No, sir. * * *

"*Q.* Why did you get closer to the machine when you were doing nothing than when you were feeding?

"*A.* I don't know. I slipped there.

"*Q.* Who slipped you over?

"*A.* I did myself.

"*Q.* You slipped over next to the machine?

"*A.* Yes.

"*Q.* Who told you to do that?

"*A.* No one.

"*Q.* The place the foreman told you to sit and operate the machine, if you had sat there, you would not have got hurt, would you?

"*A.* No, sir.

"*Q.* Now, you were sitting there doing nothing, so you slipped up next to the machine?

"*A.* Yes.

"*Q.* Then how did you get your hand in there? What were you doing to get it in there?

"*A.* Nothing. * * *

"*Q.* What would cause you to slip on the frame?

"*A.* I can't tell you now how I got in there; I was so excited.

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"Q. You couldn't tell anything about it?
"A. No, sir.
"Q. But you stated while he was fixing the machine you yourself moved yourself over next to the machine. Is that true?
"A. I just moved over there. I didn't know anything about anything.
"Q. You must have moved over there without knowing anything about it?
"A. Not particular.
"Q. You must have moved over there, to get your fingers in there?
"A. Yes."

He then stated he got closer to the cogwheels in order to straighten the boards that were on the table from which he took them. His cross-examination also showed the following:

"Q. How long had you been working at that kind of work there?
"A. I had for two years ago; a year and a half.
"Q. How near was the planer that your brother ran to the one you ran?
"A. Right beside of each other; enough room to go through.
"Q. As near as from me to that desk?
"A. Just about.
"Q. Right close together?
"A. Yes.
"Q. So, whenever your brother was running this short stuff through, and had been running it through for eight or nine months, you saw just how he would do it?
"A. Yes.
"Q. And after looking at him you knew just as much about how to do it as he did, didn't you?
"A. Why, yes.
"Q. Of course you did; and you knew all about that machine, didn't you, and knew if you got your hand in those cogs around on the back side of that machine you would get them hurt?
"A. No, sir.
"Q. You didn't know it?
"A. No, sir.
"Q. Why?

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"*A.* Because I never examined the machine before.

"*Q.* Didn't you know that if cogwheels are working in together, and you stuck your fingers down in there, it would hurt them?

"*A.* Sure, it will hurt them.

"*Q.* Did you know it on that day?

"*A.* No, sir.

"*Q.* Why?

"*A.* I paid no attention to it.

"*Q.* Oh, on that day, and prior to that day, you didn't know it would hurt if you stuck your finger into a cogwheel if it was coming together?

"*A.* Anybody knows it would.

"*Q.* Then you knew if you got your fingers in there they would get hurt, at that time?

"*A.* After I got them in I knew I did.

"*Q.* Didn't you know it before you put them in?

"*A.* No, sir.

"*Q.* Then before you got your fingers in the cogwheel you thought you could do that without their being hurt?

"*A.* No, sir.

"*Q.* You didn't know it?

"*A.* No, sir.

"*Q.* You didn't know they would be hurt if you got them in there?

"*A.* Yes; I knew if I got them in there they would be hurt.

"*Q.* Certainly; and the way,—how you got your fingers in there,—you don't know?

"*A.* No, sir.

"*Q.* Now, all the time you worked there those cogwheels were uncovered, that you worked at?

"*A.* Yes.

"*Q.* Cogwheels right in plain sight all the time?

"*A.* Yes.

"*Q.* You knew they were uncovered all the whole time?

"*A.* Yes.

"*Q.* Did you ever object to working with your machine with the cogwheels uncovered? * * *

"*A.* No, sir.

"*Q.* Never made any objection of any kind, did you?

"*A.* No, sir.

"*Q.* Had you worked on that matcher as your steady job for nine months before you were hurt?

"*A.* Yes. * * *

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"*Q.* The machine was exactly in the same condition the day you were injured as it was during all the time you worked there, wasn't it?

"*A.* Yes.

"*Q.* It hadn't been changed in any way, shape, or manner, had it?

"*A.* No, sir.

"*Q.* The same cogs?

"*A.* Yes.

"*Q.* Worked in the same way?

"*A.* Yes. * * *

"*Q.* And when this 18-inch stuff would come to your planer, as I understand you, you had exchanged with your brother?

"*A.* Yes; I did when he was there.

"*Q.* And then he would run through the 18-inch stuff, and you would run through the stuff on his machine?

"*A.* Yes.

"*Q.* And you saw how your brother did the work?

"*A.* Yes.

"*Q.* Why did the foreman, then, have to tell you how to do it, if you had known how?

"*A.* He didn't tell me how to do it. He told me to sit on it.

"*Q.* He didn't tell you to sit on there, or what to do. You knew what to do, didn't you?

"*A.* Yes.

"*Q.* You had seen your brother do it time and again?

"*A.* Yes.

"*Q.* And you did the work exactly as you had seen your brother do it?

"*A.* Yes."

The plaintiff was a boy of at least ordinary intelligence, and, while his testimony is not ingenuous, it is impossible to read it without coming to the conclusion he had worked about and with this machine so long that he knew its manner of operation, the position of the cogwheels, the office they performed, and that if he got his fingers between the cogwheels he would be injured. It is difficult to see how any warning would have helped him, for he already knew the danger. *Palmer* v. *Harrison*, 57 Mich. 182 (23 N. W. 624); *Ertz* v. *Pierson*, 130 Mich. 160 (89 N. W. 680). The plaintiff was entirely familiar with the

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manner of operating the machine. For months he had used it himself. He had planed lumber from 4 feet to upwards of 12 feet in length, and he had seen his brother plane the 18-inch lengths, and had done so himself for an entire day before the accident. The case is unlike *Allen* v. *Jakel*, 115 Mich. 484 (73 N. W. 555), where a girl but 14 years of age, entirely without experience, was employed upon a mangle. It is also unlike the case of *Ertz* v. *Pierson*, 130 Mich. 160 (89 N. W. 680), where an inexperienced boy was set to operating a feed cutter without being instructed as to the manner of doing the work. In the last-named case there was a dissenting opinion, while it was stated in the prevailing opinion that the case was very near the border line. It is believed no case can be found where, under a record like this, a defendant was held liable. The principles announced in *Palmer* v. *Harrison*, 57 Mich. 182 (23 N. W. 624), *Borck* v. *Nut Works*, 111 Mich. 129 (69 N. W. 254), *Journeaux* v. *E. H. Stafford Co.*, 122 Mich. 396 (81 N. W. 259), and cases there cited, control this case. A verdict should have been directed for defendant.

Judgment reversed, and a new trial ordered.

HOOKER, C. J., CARPENTER and MONTGOMERY, JJ., concurred with MOORE, J.

GRANT, J. I think no new trial should be granted.

LAKE *v.* PERE MARQUETTE RAILROAD CO.[1]

1. LABOR LIENS—ATTACHMENT—SERVICE ON CARRIER.
   Under section 10761, 3 Comp. Laws, a sheriff may attach a car load of shingles for labor liens by serving a copy of the writ

[1] Rehearing denied March 9, 1903.

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upon a station agent of a railroad company in whose possession the shingles are for the purpose of transit to a place within this State, although, at the time, they are in a different county from that in which the service is made.

2. SAME—DELIVERY.
In such case the railroad company should deliver the attached property at once to the sheriff.

3. SAME—CONSTRUCTION OF STATUTE.
The statute, in providing that no sheriff shall seize and detain such property while in transit, indicates the legislative intent to permit it to be attached by service of the writ upon the company.

4. SAME—CONSTITUTIONAL LAW—COST OF CARING FOR ATTACHED PROPERTY.
The statute is not unconstitutional in not providing for the payment to the company of the expense of caring for the property from the time of service of the writ to the time the sheriff makes a demand for the property, since, in the case of a carrier, delivery should be made at once to the sheriff.

Error to Clare; Dodds, J. Submitted December 2, 1902. (Docket No. 127.) Decided January 27, 1903.

Trover by Sheldon Lake against the Pere Marquette Railroad Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Frederick W. Stevens (*Charles McPherson*, of counsel), for appellant.

John Quinn (*C. W. Perry*, of counsel), for appellee.

CARPENTER, J. On an agreed statement of facts, the court below held the defendant liable to plaintiff for the conversion of a car load of shingles, and assessed his damages at the sum of $100.20. On February 19, 1901, while this car load of shingles was being carried over defendant's road from Harrison, in Clare county, to Flint, in Genesee county, Mich., and less than two hours before it reached Flint, plaintiff, the deputy sheriff of the county of Clare, served on defendant's station agent at Harrison

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eight copies of writs of attachment issued to enforce liens for labor in pursuance of Act No. 229 of the Public Acts of 1887, the same being 3 Comp. Laws 1897, §§ 10756–10770, under the claim that said service attached the car load of shingles in question by virtue of a provision in section 6 of said act, hereinafter set forth. The station agent at Flint, having no notice of said attachment suits, delivered the shingles in controversy to the consignee about nine hours after said service on the company's agent at Harrison. The attachment suits proceeded regularly to judgment. On October 9, 1901, plaintiff demanded the shingles in controversy, and defendant refused to comply with said demand.

The defendant asks this court to reverse the judgment of the court below on two grounds: *First*, that the service of the writ in question was not authorized by law; *second*, that, if such service was authorized, the law is unconstitutional.

1. That portion of the law relative to the service of the writ in question is found in section 6 of the act (3 Comp. Laws 1897, § 10761), and reads as follows:

"*Provided*, that no sheriff or other officer shall seize upon and detain any such property or products when in transit from the place where banked or deposited for shipment on the railroad, or for flotage in the stream or streams, or for transportation on the waters of this State, when such place of destination is within this State; but in case such products are in transit, or are in possession of any booming company or other person or corporation for the purpose of being driven or sorted and delivered to the owners, or to satisfy any statutory lien, then levy and attachment of said property or products may be made by serving a copy of said attachment upon the person or corporation driving or holding the same, who shall, from the time of such service, be deemed to hold the same both on their own behalf and in behalf of said sheriff or other officer, to the extent of said attachment lien, until the same can be driven and sorted out; and, when driven or sorted out, said sheriff or other officer may receive said products from said person or corporation, and the statutory lien of said person or corporation shall not be released by

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the holding of said sheriff or other officer; and in case of sale by the sheriff or other officer on execution, and when the proceeds of sale shall not be sufficient to satisfy all liens in full, then such proceeds shall be distributed *pro rata* to all parties in interest, under the special order and direction of the court having jurisdiction in said attachment."

Defendant contends that the proper construction of this language permits service of writs of attachment, in the manner attempted in this case, only when forest products are in the possession of some person or corporation for the purpose of being driven or sorted out, and therefore does not permit such service when a railroad company, as in this case, is merely carrying them for the purpose of making a delivery. This contention is based on the latter part of the language above quoted. This language, it is to be observed, was copied verbatim from 2 How. Stat. § 8417, contained in an act giving a lien only for "services in cutting, skidding, falling, hauling, scaling, banking, driving, running, rafting, or booming any logs, timber, cedar posts, telegraph poles, railroad ties, tan bark, shingle bolts or staves." That act was repealed, and its application extended to "lumber, shingles, and all other forest products," by the act under consideration. The prohibition of an actual seizure of products deposited for shipment on the railroad sufficiently indicates the legislative intent to permit them to be attached by service of the writ on the company. Otherwise, we are forced to the conclusion, forbidden by the statute, that the legislature intended to exempt forest products altogether from attachment while in the possession of a railroad company.

Does the language of the latter part of the clause under consideration make this intent altogether ineffective? The statute reads (the brackets are inserted by us for the purpose of this opinion):

"In case such products are in transit [or are in possession of any booming company or other person or corporation for the purpose of being driven or sorted and deliv-

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ered to the owners, or to satisfy any statutory lien], then levy and attachment of said property or products may be made by serving a copy of said attachment upon the person or corporation driving or holding the same."

If we omit the clause inclosed in brackets, as, clearly, we may for the purpose of construction, authority is given (and this justified the service under consideration) to attach forest products in transit by serving a copy of said attachment upon the corporation holding the same. Thus far, then, there is no difficulty. The difficulty arises from the words following, namely:

"Who shall, from the time of such service, be deemed to hold the same both on their own behalf and in behalf of said sheriff or other officer, to the extent of said attachment lien, until the same can be driven and sorted out; and, when driven or sorted out, said sheriff or other officer may receive said products."

Does this language restrict the right to attach "by service of a copy of the writ" to cases where the products are yet to be driven or sorted out? The statute expressly authorizes the service in three cases: (*a*) Where the products are in transit; (*b*) where they are in the possession of any booming company or other person or corporation for the purpose of being driven or sorted and delivered to the owners; (*c*) where they are held to satisfy any statutory lien. The clause which creates the entire difficulty is that permitting the custodian of the attached products to hold the same, and to continue his custody "until the same can be driven and sorted out," and has application to but one of the cases in which this method of attachment is authorized. We are clearly not warranted in confining to one case the right expressly given in three, because provision is made for the continuance of the custodian's possession in that one only. It is rather to be presumed that the legislature thought that this was the only case in which the attached products would not be in a condition for immediate delivery, and therefore made provision for no other such case. It would have been

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wise for the legislature to state explicitly when products attached in transit should be delivered; but the legislative intent that such delivery should take place at once is clearly manifest, and only a species of technical reasoning would warrant us in construing the statute as though it were not stated.

2. It is claimed that the statute is unconstitutional, because "the carrier must retain possession until the sheriff makes demand for delivery, it can only do so at considerable expense," and no provision for the payment of this expense is made. It is a sufficient answer to this contention to say that the statute, in our judgment, as already indicated, intends the sheriff to take immediate possession of the attached products. From the time of the attachment, the attached products are in his official custody, constructively, if not actually, and express authority is given the officer to "pay the storage on such products during the time that he shall have the custody thereof by virtue of such writ of attachment, * * * which shall be included and taxed in the bill of costs or disbursements." 3 Comp. Laws 1897, § 10769. In the case at bar, this provision has no application. Defendant could make no claim for storage on the ground that plaintiff did not demand possession for several months. By delivering the products to the consignee in disregard of plaintiff's rights, defendant not only lost all right to compensation for their storage, but made itself legally chargeable for their conversion.

The judgment of the court below is affirmed.

The other Justices concurred.

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SALTONSTALL *v.* BOARD OF REVIEW OF CITY OF CHEBOYGAN.

TAXATION—ASSESSMENT—CASH VALUE—WILD LANDS—CONSTITUTIONAL LAW.

Const. art. 14, § 12, requiring all assessments to be on property at its cash value, does not permit an assessment on any other basis than actual value; and a provision in a city charter that wild and unimproved lands shall be assessed at their true cash value considering the location, and not according to any prospective or supposed value of such lands as city property, is invalid.

Certiorari to Cheboygan; Shepherd, J. Submitted December 2, 1902. (Calendar No. 19,443.) Decided January 27, 1903.

Mandamus by Brayton Saltonstall to compel the board of review of the city of Cheboygan to modify an assessment. From an order denying the writ, relator brings *certiorari*. Affirmed.

Cross & Harpster (*DeVere Hall*, of counsel), for relator.

C. S. Reilley, for respondent.

MONTGOMERY, J. The charter of the city of Cheboygan contains the following provision:

"In assessing lands within said city which are held and used merely as farming lands, or which are wild and unimproved, the supervisor shall assess such farming lands and such wild and unimproved lands at their true cash value considering the location of the same, and not according to any prospective or supposed value of such lands as city property." Act No. 333, Local Acts 1889, chap. 25, § 1.

We shall assume that the pleadings in this case fairly

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raise the question of the constitutionality of this provision. Const. art. 14, § 12, provides that all assessments hereafter authorized shall be on property at its cash value. We are all agreed that this constitutional provision does not leave room for a different basis of valuation of real property as vacant or occupied. Nor can it be evaded by authorizing a valuation of one class of property based upon its value for a particular use only. To use an extreme illustration, a valuable painting might be framed so as to be available for use as a fire screen. Yet it would not do to say that this constitutional requirement was met by authorizing the assessment of such a piece of property at its cash value as a fire screen. The only safety is in refusing to fritter away this valuable protection to the taxpayer by any refined construction. The intent of the framers of this provision is perfectly clear, and we hold that the actual value of the land must be the basis for assessment. See cases cited in note to section 3847, 1 Comp. Laws. Cases cited from other jurisdictions, construing constitutional provisions essentially different from ours, are of little aid, and certainly cannot be given the force of authority justifying a distortion of plain English.

It follows from the views expressed that the decision of the circuit court should be affirmed, and the writ of *mandamus* denied, with costs.

The other Justices concurred.

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AUDITOR GENERAL *v.* HOFFMAN.

1. APPEAL—TAXES—OBJECTIONS NOT MADE IN ANSWER.
   Objections to a tax which were not made in the contestant's answer to the petition of the auditor general will not be considered on appeal.

2. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—WAIVER OF IRREGULARITIES.
   Where a city charter does not provide that a petition for paving or macadamizing streets shall be signed by any specific number or class of inhabitants, and does not expressly deny to the council the authority to levy a special assessment for such improvement without a petition, a landowner, knowing that a pavement is being laid, and making no objection until he files his answer to the tax petition of the auditor general, cannot complain that the petition to the council to "take immediate steps to repair and place the street in first-class condition" was not sufficiently specific.

3. SAME—RESOLUTION OF COUNCIL—NECESSARY VOTE TO PASS.
   A city charter provision that no resolution or proceeding of the common council imposing taxes or assessments, and no ordinance, shall be passed at the same meeting at which it is introduced, if there be any objection; and no ordinance shall be passed except by a two-thirds vote of the aldermen elect, —does not require a resolution imposing taxes to be passed by a two-thirds vote.

4. SAME—SPECIAL ASSESSMENT ROLL—CONFIRMATION BY COUNCIL.
   The action of the common council of a city in passing a resolution that a special assessment roll, as reported by the city engineer, "be and the same is hereby accepted and adopted," will be treated as a confirmation, under a charter provision requiring that the common council shall by resolution confirm the same.

5. SAME—PRESUMPTIONS AS TO PERFORMANCE OF DUTY.
   It will not be presumed that a common council neglected to perform its duty in reviewing and examining a special assessment roll, as required by the city charter.

6. SAME—NOTICE OF HEARING.
   A charter provision which requires notice that a special assessment roll has been completed to be given in two weekly pub-

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lications of the official newspaper of the city, and allows two weeks from the first publication for filing objections, is not invalid for failure to provide reasonable notice.

7. SAME—REVIEW OF ROLL.

Where the charter requires the common council to review a special assessment roll and consider objections, it is competent for the legislature to leave the time and place of hearing to be determined by the council.

Appeal from St. Clair; Law, J. Submitted December 4, 1902. (Docket No. 144.) Decided January 27, 1903.

Petition by Perry F. Powers, auditor general, for the sale of land delinquent for taxes: On objections filed by Wesley L. Hoffman. From a decree for petitioner, contestant appeals. Affirmed.

Joseph Walsh (*Beach & Benedict*, of counsel), for petitioner.

William T. Mitchell, for contestant.

CARPENTER, J. Contestant appeals to this court from a decree made by the circuit court for the county of St. Clair, in chancery, overruling his objections to a special assessment on his land for macadamizing Gratiot avenue in the city of Port Huron. Several objections to the tax are made in this court which were not contained in contestant's answer to the petition of the auditor general. These, under the authority of *Auditor General* v. *Maier*, 95 Mich. 127 (54 N. W. 640), we cannot consider.

The objections urged against the tax which are open to consideration by this court are four:

(1) That the common council of Port Huron was not asked by petition to order the macadamizing in question.

(2) That the resolution which approved the assessment roll and determined the tax to be paid by the different owners in the assessment district was not adopted by a two-thirds vote of the common council.

(3) That the assessment roll was not confirmed, as required by the charter of the city of Port Huron.

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(4) That the charter of Port Huron does not provide a reasonable notice or adequate hearing to persons affected by assessments of this character.

Each of these questions will be considered separately.

1. The council was, on March 21, 1898, petitioned to "take immediate steps to repair and place in first-class condition such portions of Gratiot avenue, from the north curb line of State street to the city limits, that may, in the opinion of the superintendent of public works and the city engineer, require such repairs to place the roadway in serviceable condition during the summer months." Section 1 of chapter 17 of the charter of the city of Port Huron gave the common council authority "to levy and collect special assessments for the following purposes: *First*, to defray the costs and expenses of * * * paving * * * or macadamizing of any of the streets; * * * *second*, to defray the costs and expenses of repairing any of the streets." Act No. 381, Local Acts 1895. The section immediately following reads as follows:

"When a petition shall be presented to the common council asking for the grading, curbing, paving, graveling, claying, planking, or macadamizing of any street, lane, alley, highway, or avenue in said city, or for improving the same by a combination of any such methods, or for repairing to such an extent that a special assessment may be made therefor, or for the construction of any drain or sewer, * * * the common council shall determine by resolution as to the necessity of doing such work."

There is no provision in the charter that the petition referred to in the last section shall be signed by any specified number or class of the city's inhabitants, nor does the charter expressly deny authority to the council to levy and collect special assessments except when they are made in pursuance of a petition. The macadamizing in question was done in 1898. Contestant testified that he knew that the pavement was being laid, but raised no protest to the same, and he made his first objection on the 19th day of March, 1902, when he filed the objections under considera-

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tion. Contestant cannot, under these circumstances, complain because the petition was not more explicit.

2. Did the charter require that the resolution fixing the assessment district and determining the taxes to be paid by the different owners should be adopted by a two-thirds vote of the aldermen? This depends upon the construction to be given to section 15 of chapter 7 of the charter, which reads as follows:

"No resolution or proceeding of the common council imposing taxes or assessments, and no resolution or proceeding incurring any debt or liability in excess of the sum of fifty dollars, and no ordinance, shall be passed at the same meeting at which it was introduced, if there be any objection made thereto by any of the aldermen present; and no ordinance shall be passed except by a two-thirds vote of the aldermen elect, and such vote shall be taken by yeas and nays, to be entered upon the record; and the yeas and nays shall be taken upon any question entered upon the record upon the demand of any one of the members present." Act No. 381, Local Acts 1895.

Contestant contends that the language, "except by a two-thirds vote of the aldermen elect, and such vote shall be taken by yeas and nays, to be entered upon the record," applies to resolutions or proceedings imposing taxes or assessments. We do not agree with him. In our judgment, it applies only to ordinances.

3. Was the special assessment roll confirmed, as required by the charter? The charter (chapter 17, § 7), at the time these proceedings were taken, provided:

"The common council shall review said roll, and consider the objections, and may refer the said roll back to the engineer for further revision or correction, and, when satisfied with the same, it shall by resolution confirm the same." Act No. 445, Local Acts 1897.

What was done was this: The city engineer reported that he had made out a special assessment roll for constructing the Gratiot-avenue macadamizing; that, "on completion of the same, it was duly advertised in the official paper of the city of Port Huron for two weeks, and,

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no objection having been filed to the same, I have certified it, as required by the charter, and submit herewith for confirmation." The records show that the common council adopted the following resolution: "*Resolved*, that the special assessment roll '48' for paving Gratiot avenue, as reported by the city engineer, be and the same is hereby accepted and adopted." This was, in everything but in name, a confirmation, and should not be held nugatory simply because that name was not used. Nor is it to be supposed, as contestant's counsel urges, that the common council did not review or examine said roll. It should be presumed that the council did its duty.

4. Did the charter provide a reasonable notice and adequate hearing to the persons affected by the assessment? The notice required by the charter was two weekly publications in the official newspaper of the city, and two weeks from the first publication was given for the filing of objections. The authority belongs to the legislative and not to the judicial department of government to determine what notice should be given in cases of this character, and how it should be given. Courts will uphold this legislative determination unless it clearly appears to result in a denial of justice. The determination in question, in our opinion, leads to no such result, and we are referred to no authority which so holds.

It is also urged that there was no provision for the hearing of objections which might be made during these two weeks. The charter provides, as already indicated, that "the common council shall review said roll, and consider the objections." It is true that no provision is made as to when and where these objections shall be heard. We think that it was entirely competent for the legislature to leave this matter to be determined by the council. It is to be presumed that, in considering the objections, as required by the charter, the council will give a hearing suited in time and place to the exigencies of the situation. Contestant, having made no objection, is in no position to complain of improper treatment in this particular.

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It results from this opinion that the decree of the court below should be affirmed.

HOOKER, C. J., MOORE and MONTGOMERY, JJ., concurred. GRANT, J., did not sit.

MOROSS *v.* MOROSS.

1. HUSBAND AND WIFE—DIVORCE—DOWER.
   A wife who has obtained a divorce from her husband on the ground of extreme cruelty is entitled to dower in his lands in the same manner as if he were dead.

2. SAME—DECREE—EJECTMENT—STATUTE OF LIMITATIONS.
   A divorced wife's right to dower in her husband's lands is not based upon the decree, but upon the statute (3 Comp. Laws, § 8639), and therefore her right of action to recover possession is not barred in 10 years, the time limited for bringing actions upon judgments and decrees, but only by the 15 years allowed by the statute (3 Comp. Laws, § 9714, subd. 3) for the recovery of the possession of lands.

Error to Wayne; Carpenter, J. Submitted January 7, 1903. (Docket No. 13.) Decided January 27, 1903.

Ejectment by Louise Moross against Victor J. Moross and another. From a judgment for plaintiff on verdict directed by the court, defendant Moross brings error. Affirmed.

Plaintiff obtained a decree of divorce from her husband, the defendant, for extreme cruelty, on July 29, 1889. On January 16, 1901, she instituted this suit in ejectment to recover her dower interest in her husband's lands. The defense is that her right of action is barred by the statute of limitations. The court below found against this contention, and directed a verdict for the plaintiff.

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William B. Jackson (*Cutcheon, Stellwagen & MacKay*, of counsel), for appellant.

William E. Walsh (*George Gartner*, of counsel), for appellee.

GRANT, J. (*after stating the facts*). If the action is based upon the decree, the defendant's contention should prevail, because every such action must be brought within 10 years after the entry of the decree. 3 Comp. Laws, § 9751. If it is not based upon the decree, then the plaintiff must prevail, because this is a real action, and the statute gives her 15 years within which to bring it after the right has accrued. 3 Comp. Laws, § 9714, subd. 3. The decree is entirely silent as to the property rights of the plaintiff. No alimony, even, was decreed her. She was granted a decree, with the custody of her minor child.

A wife's inchoate right of dower becomes fixed and recoverable by suit on the happening of two events,—death (3 Comp. Laws, § 8918), and divorce for certain causes (3 Comp. Laws, § 8639). Extreme cruelty is one of the causes covered by the statute. *Rea* v. *Rea*, 63 Mich. 257 (29 N. W. 703). The statute gives her "dower in his lands in the same manner as if he were dead." As to her property rights, he became legally dead when the divorce was granted. In establishing this right, the law makes no distinction between actual death and legal death. Her right is not based upon the decree, and her suit is not brought upon it. The decree is the evidence only that the event had happened by which her right of action to recover that which the statute gives her had accrued. The statute, not the decree, gave her dower in her husband's lands. The decree, under the statute, simply fixed the time when her right of action accrued. Whether the death be actual or legal, the statute of limitations in regard to real actions controls, and it follows that the judgment must be affirmed.

HOOKER, C. J., MOORE and MONTGOMERY, JJ., concurred. CARPENTER, J., did not sit.

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GREGORY v. TOMPKINS.

1. WILLS—INTERPRETATION.
   The primary object in the interpretation of a will is to ascertain, if possible, the intent of the testator, and give effect to it.

2. SAME.
   A will should be so construed as to give effect, if possible, to every part of it.

3. SAME.
   A testator devised land to S., and charged her with the payment of $2,000 to A. To A. he gave $3,000, to be paid as soon as the estate was settled; $2,000 of it to be paid out of the share of S., and the balance out of any portion of the estate not specially devised. He directed his executors to use $2,500 to buy a home for A. within a reasonable time after his death, and to pay over to the parties entitled thereto the property left by him. *Held*, that A. was entitled to both $3,000, and $2,500 to be invested in a home.

Appeal from Wayne; Donovan, J. Submitted January 7, 1903. (Docket No. 11.) Decided January 27, 1903.

Bill by Fred E. Gregory, surviving executor of the last will and testament of William Ten Eyck, deceased, against Anna M. Tompkins, Maria B. Sloss, and Sarah Tompkins, for a construction of said will. From a decree for defendant Anna, complainant and the other defendants appeal. Affirmed.

Orla B. Taylor, for complainant.

Ralph Phelps, Jr., for defendants Sloss and Sarah Tompkins.

Rowland M. Connor, for defendant Anna M. Tompkins.

MOORE, J. The bill of complaint is filed in this cause to obtain a construction of paragraph 7 of the will of Wil-

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liam Ten Eyck, deceased. He left an estate aggregating about $235,000, which he disposed of by the will which is to be construed. Mr. Ten Eyck was an old man when he died. His heirs at law are a niece 17 years old, a nephew 50 years old, and five sisters, the youngest of whom is 64 years old, and the oldest 80 years old. A sister of Mr. Ten Eyck married Daniel D. Tompkins after the death of his first wife, who was the mother of Daniel D. Tompkins, Jr. This son married Anna M. Tompkins. He died in 1896, leaving a widow, Anna M. Tompkins, the defendant, and three minor children. The defendants Maria B. Sloss and Sarah Tompkins are the residuary legatees under the will. After the provisions of the will are carried out, they will each receive upwards of $75,000.

Those parts of the will which are necessary to an understanding of the case read as follows:

"*Fifth.* I give and devise * * * the next eighteen and three-quarters (18¾) feet to Sarah Tompkins, and the remaining thirty-seven and one-half (37½) feet to Maria B. Sloss; and I do hereby charge the said Sarah Tompkins, and the eighteen and three-quarters (18¾) feet given to her, with the payment of the sum of two thousand ($2,000) dollars, to be paid to Anna M. Tompkins, as hereinafter provided. * * *

"*Seventh.* I give and bequeath to Anna M. Tompkins, widow of Daniel D. Tompkins, Jr., deceased, the sum of three thousand ($3,000) dollars, to be paid as soon as my estate is settled, two thousand ($2,000) dollars of said sum to be paid out of the share of Sarah Tompkins, as hereinbefore provided, and the balance of one thousand ($1,000) dollars to be paid out of the portion of my estate not especially devised or bequeathed to any person; and I direct that my executors shall use the sum of twenty-five hundred ($2,500) dollars for the purpose of buying a home for the said Anna M. Tompkins, the same to be purchased within a reasonable time after my death. * * *

"*Fifteenth.* I do hereby nominate and appoint as executors of this, my last will, my friends Fred E. Gregory, of Dearborn, and William Daly; * * * and I direct my said executors, or the survivor of them, to pay over to the parties entitled thereto the property left by me."

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Counsel are agreed there is but one question in the case, and that is, Does the seventh paragraph of testator's will give to Anna M. Tompkins $3,000 in cash, and, in addition thereto, $2,500, to be converted into a home by the executors, or does it give her only $3,000, and direct the executors to purchase the $2,500 home out of the $3,000? The circuit judge construed the will to give to Mrs. Tompkins not only the $3,000 in cash, but $2,500 to be invested by the executors in a home for Mrs. Tompkins. From that decree the surviving executor and defendants Maria B. Sloss and Sarah Tompkins have appealed, claiming that the $2,500 invested in a home should be taken from the $3,000, leaving but $500 to be paid over to Mrs. Tompkins.

The following principles of law are well recognized in this State:

"The primary object in interpreting a will is to reach, if possible, the intent the testator had in mind, and give effect to it. *Rock River Paper Mill Co.* v. *Fisk*, 47 Mich. 212 (10 N. W. 344).

"The whole will is to be taken together, and is to be so construed as to give effect, if possible, to every part. *Thurber* v. *Battey*, 105 Mich. 718 (63 N. W. 995); *Gadd* v. *Stoner*, 113 Mich. 689 (71 N. W. 1111); *Smith* v. *Jackman*, 115 Mich. 192 (73 N. W. 228)."

They do not, however, afford very much aid in construing this will.

Without discussing very much in detail the reasons which lead us to the conclusion, we are of the opinion the circuit judge gave a right construction to the provisions of the will. It will be observed that by paragraph 5 of the will Mr. Ten Eyck devised to Sarah Tompkins certain real estate, and charged her, and the real estate devised, with the payment of $2,000, to be paid to Anna M. Tompkins as thereinafter provided. By paragraph 7 he gives and bequeaths her the sum of $3,000, to be paid "as soon as my estate is settled, $2,000 out of the share of Sarah Tompkins, and the balance of $1,000 out of the portion of

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my estate not especially devised or bequeathed to any person; and I direct that my executors shall use the sum of $2,500 for the purpose of buying a home for the said Anna M. Tompkins, the same to be purchased within a reasonable time after my death." By paragraph 15, executors are appointed, who are directed to pay over to the parties entitled thereto the property left by the testator.

By the provisions of the will, within a reasonable time after testator's death the sum of $2,500 is to be used by the executors for the purpose of buying a home for Mrs. Tompkins. This would indicate the executors are not to wait until the estate is settled before making this investment. In the early part of the paragraph a bequest of $3,000 was made to Mrs. Tompkins, to be paid as soon as the estate was settled. If the testator had intended the executors should deduct from this sum the amount invested in the home, it would have been very easy for him to say so, but he did not do so. He provided generously for the other objects of his bounty. While the case is not free from doubt, we think the circuit judge made a proper disposition of the case.

The decree of the court below is affirmed.

HOOKER, C. J., GRANT and MONTGOMERY, JJ., concurred. CARPENTER, J., did not sit.

LASLEY *v.* PRESTON.

1. JUDICIAL RECORDS—PRESUMPTION OF NOTICE.
   After the lapse of 20 years, an order of the probate court will be presumed to have been based on due notice.

2. EVIDENCE—ANCIENT DOCUMENTS—PRESUMPTION.
   An agreement for the settlement of an estate, filed in the probate court, will be presumed to be genuine after the lapse of 20 years.

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3. JUDICIAL RECORDS—DIVISION OF ESTATE—PARTIES.
An order of the probate court dividing an estate in accordance with the terms of an agreement necessarily involves a determination that all the parties in interest were before the court.

4. EVIDENCE—RECORDS OF PROBATE COURT.
A probate record of the proceedings in the settlement of an estate is not rendered inadmissible by the fact that there were entered therein purported copies of powers of attorney and releases which had been used as evidence by the probate judge in settling the estate.

5. ESTATES OF DECEDENTS—CONSTRUCTION OF AGREEMENT.
The heirs of a decedent entered into an agreement by which part of them assigned to S. "all their right and interest in and to the share of the whole of the estate remaining as is hereinafter more fully specified." A subsequent provision recited that the heirs should be tenants in common, and that S. should receive four out of fifteen shares. *Held*, that S. was not entitled to the whole estate by the assignment, but the language quoted referred to the share allotted to him in the subsequent provision.

Error to Mackinac; Shepherd, J. Submitted January 15, 1903. (Docket No. 52.) Decided January 27, 1903.

Ejectment by George Lasley, Peter Lasley, and Isabel A. Lasley against William P. Preston. From a judgment for plaintiffs on verdict directed by the court, defendant brings error. Affirmed.

Henry Hoffman (*A. H. Ryall*, of counsel), for appellant.

M. Brown (*James McNamara*, of counsel), for appellees.

MONTGOMERY, J. This is an action of ejectment, brought to recover eight-fifteenths part of certain lands described in the declaration. The plaintiffs had judgment, and the defendant brings error.

The plaintiffs' title is derived through William Lasley and George Lasley, who were, by the decree of the pro-

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bate court of the county of Michilimackinac, decreed to be each entitled to four-fifteenths of the land as heirs of Samuel C. Lasley, deceased, which decree bears date March 6, 1848. The questions presented relate to the admissibility of this record in evidence and to the effect of the decree. It is contended by the defendant that the record is not admissible as evidence:

"1. For the reason that none of the parties to the agreement, as appears by said agreement, appeared before the court at the time of the presentation of this agreement, or at the time of the making of the order based upon this agreement.

"2. That the said agreement was not signed by John D. Lasley, one of the parties in interest, or by any one authorized to sign for him.

"3. That it does not appear from said record that the parties to the said agreement were all the parties interested in said estate, and in the land in question, as heirs of Samuel C. Lasley.

"4. That a part of said record, if not all of it, was made up of a record of instruments not authorized by law to be recorded in the office of the probate court."

As to the first and second of these objections, we think the presumption in favor of jurisdiction should obtain. In 1 Greenl. Ev. (16th Ed.) p. 115, the rule is correctly stated:

"The presumption will also be made, after 20 years, in favor of every judicial tribunal acting within its jurisdiction, that all persons concerned had due notice of its proceedings."

There can be no doubt that the probate court had jurisdiction to determine the heirs and to make the order which it entered, and therefore this presumption should be indulged.

The third contention, viz., that it does not appear that all the parties interested in said estate were parties to the agreement entered into, may be answered by the same considerations, for it was not alone the agreement of the parties which appears of record, but the determination of the court that the estate of Samuel C. Lasley, deceased,

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should be divided in accordance with the terms of the agreement, and this, of necessity, involved the determination that the parties interested in the estate were before the court.

The fourth point is based upon the fact that there were entered of record purported copies of powers of attorney, releases, etc., which were certified by the probate judge to be a true copy. We think the objection mistakes the purpose of these entries. These instruments were not recorded as notice to the world of the rights which they conferred, but appear to have been entered by the probate judge as a part of the evidence upon which he acted, or, more properly, as copies of the evidence upon which he acted. This was probably an unnecessary proceeding, as, had the probate court determined the facts as those copies of instruments would indicate them to exist, the record would have been conclusive without any entry of the evidence upon which it was based.

The remaining contention is that, by the terms of the agreement, the title to the land is shown to have been vested in Henry Silby, and this is based upon the agreement, which is in part as follows:

"And, for value received of George Lasley, the said John Lasley assigns to said George Lasley, his heirs, executors, administrators, and assigns, all his right and interest in and to the whole of said estate, except as to the said Lasley farm; and in consideration of certain sums advanced by said Henry Silby for the said estate, and for other valuable considerations, the said parties of the first part, for themselves and for each of their heirs, executors, administrators, and assigns, have assigned and hereby do assign to the said Henry Silby, and to his heirs, executors, administrators, and assigns, all their right and interest in and to the share of the whole of the estate remaining as is hereinafter more fully specified; the said pieces and parcels of land, with their hereditaments and appurtenances, which are hereby intended to be divided among the said several parties, being as follows."

This is subsequently followed by another provision:

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"It is hereby agreed by and between the above parties, and each one, for himself and herself, and for his and her heirs, executors, administrators, and assigns, that the whole of the above-mentioned property remaining for distribution in the estate of Samuel C. Lasley shall be held and owned by said William Lasley, George Lasley, James Lasley, Julian Silby, Samuel J. Irvine, and Henry Silby as tenants in common in manner following, to wit: The said William Lasley shall be entitled to four shares, the said George Lasley shall be entitled to four shares, the said James Lasley shall receive and be entitled to one share, the said Julian Silby shall receive and be entitled to one share, the said Samuel J. Irvine shall receive and be entitled to one share, and the said Henry Silby shall receive and be entitled to four shares; making in all fifteen shares or parts."

And by the determination of the court:

"The remainder of said real estate, being the two lots in the village of Mackinac, more fully described by said agreement (see pages 61, 63, and 64), to be held in common by William Lasley, George Lasley, James Lasley, Julian Silby, Samuel James Irvine, and Henry Silby (the heirs of Margaret Drew and Samuel Lasley having received their shares, as is shown by their releases—see folios 64, 65, 66, and 67—; also John Lasley, one of the heirs, having disposed of his interest to George Lasley, as is shown by his power of attorney—see folios 70 and 71—), as per said agreement, being deemed a full and final administration and bar to all further claims or demands against the said estate."

The defendant's contention is that, by the first clause quoted, the entire right of the estate in these lands was to be assigned to Henry Silby. We do not so construe it. It appears that Henry Silby had become entitled by assignment to certain interests in this land in excess of his interest as heir, so that under the agreement he was entitled to take four shares of the fifteen. We think the reference in the clause first quoted, "to the said Henry Silby, and to his heirs, executors, administrators, and assigns, all their right and interest in and to the *share* of the whole of the estate remaining as is hereinafter more fully specified,"

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must be held to refer to the share allotted to him in the subsequent clause, to wit, four-fifteenths.

We discover no error in the record, and the judgment will be affirmed.

The other Justices concurred.

CITY OF ST. JOSEPH v. SCHULZ.

1. DEDICATION OF LANDS — PLATS — APPROVAL BY AUDITOR GENERAL.

   The approval of a plat whereby land is dedicated to the public use, required of the auditor general by 1 Comp. Laws, § 3372, if, in his opinion, it conforms to the act, cannot be made in his name by a clerk in his department.

2. SAME—PARKS—EJECTMENT BY CITY.

   A city cannot maintain ejectment for the recovery of a park claimed by reason of a common-law dedication, on the authority of section 3154, 1 Comp. Laws (providing that the city may regulate the care of parks, and protect them from injury), in the absence of a showing that the city was organized under chapter 88, of which such section is a part.

Error to Berrien; Coolidge, J. Submitted June 4, 1902. (Docket No. 11.) Decided February 3, 1903.

Ejectment by the city of St. Joseph against Louis S. Schulz. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

N. A. Hamilton, for appellant.

Lawrence C. Fyfe, I. W. Riford, and *O'Hara & O'Hara*, for appellee.

GRANT, J. This is an action of ejectment brought by the city, claiming the title in fee to a piece of land marked "Public Park" upon a plat of Boughton's addition to St.

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Joseph. The plat was made by Kate Boughton and her husband in September, 1890. Mrs. Boughton died. The land marked "Public Park," in question, was sold as a part of her estate, and purchased by the defendant. The court, for various reasons, directed a verdict for the defendant.

The statute (section 3372, 1 Comp. Laws) requires that, before such plat can be recorded, or copies made therefrom, the person making the same shall forward the original plat to the auditor general, who shall approve of the same whenever such plat shall conform, in his opinion, to the requirements of the act, and shall return the plat to the person who forwarded it, with his approval indorsed thereon. The original plat contained this indorsement: "August 26th, '90. Henry H. Aplin, by Henry Humphrey." In making the copies which the statute requires, the words "Examined and approved" were written over this indorsement upon the copies.

This record, even if authorized to be made by Mr. Humphrey in the name of Mr. Aplin, is not an approval of the plat. The mere signature cannot constitute an approval. Not only is no authority shown for the signature of Henry H. Aplin "by Henry Humphrey," but there is nothing to show the signature is official. Henry Humphrey was a clerk in the office at the time, as appears by the auditor general's reports; but no power is by statute given to him to pass an approval in the name of the auditor general, even if we could take judicial notice that he was at the time an employé of that office. The authority to approve was conferred upon the auditor general alone, and not upon any clerk. The officer so appointed must perform the duty. Mechem, Pub. Off. § 567. These provisions of the statute must be substantially, if not literally, complied with. 9 Am. & Eng. Enc. Law (2d Ed.), 35; 2 Dill. Mun. Corp. (4th Ed.) § 628.

The plat dedicates "the streets and alleys as shown on said plat to the use of the public." It says nothing whatever about a public park.

There are other defects and other questions raised, but

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it is unnecessary to refer to them, as the above are sufficient to justify the finding of the circuit judge.

Judgment affirmed.

HOOKER, C. J. I concur in the affirmance of this judgment upon the ground that the plaintiff failed to show that it had title in fee to the premises. The plat not being properly approved, a statutory dedication failed. I think that the deeds of conveyance, made soon after the plat was recorded, were not inconsistent with a dedication of the alleged park, and that it should not be decided upon this record that there was no common-law dedication, but that ejectment would not lie in such a case as is here shown, even had not the declaration claimed the premises in fee. If 1 Comp. Laws, § 3154, would authorize it in such cases of dedication, we cannot say that this section applies, as it does not appear that the plaintiff is organized under chapter 88, of which section 3154 is a part.

MOORE and MONTGOMERY, JJ., concurred with HOOKER, C. J.

LONG, J., did not sit.

GEER v. TRADERS' BANK OF CANADA.

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1. TRUST DEEDS—CREDITORS—FRAUD.
   A conveyance of land in trust to sell for the benefit of creditors is authorized by statute (3 Comp. Laws, § 8839), and cannot be set aside on the ground that its effect is to hinder and delay other creditors.

2. SAME—PRESUMPTIONS.
   The presumption is in favor of the validity of such a conveyance, and that it was executed for a lawful purpose.

3. SAME—AUTHORITY OF TRUSTEE TO RENT.
   A trust deed for the benefit of certain creditors is not invalid

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because it contains a provision that the trustee may rent the property.

4. SAME—SURPLUS AFTER PAYMENT OF CREDITORS—ATTACHMENT. The surplus remaining after the payment of the creditors for whom the trust deed was made cannot be reached by an attachment levy upon the land.

Appeal from Wayne; Donovan, J. Submitted October 14, 1902. (Docket No. 54.) Decided February 3, 1903.

Bill by Harrison Geer, Joseph Turner, and Hezekiah M. Gillett, trustees, against the Traders' Bank of Canada, to set aside an attachment levy. From a decree for complainants, defendant appeals. Affirmed.

On July 22, 1896, James T. Hurst, a lumberman carrying on an extensive business in Michigan and elsewhere, being in financial difficulty, and desiring to provide for certain of his creditors, executed a deed of trust of certain real estate in the county of Wayne to the complainants, as trustees. Said deed recited that Mr. Hurst was indebted to certain parties therein named,—nine in all,—specifying the amount due to each; the aggregate being $514,000. One claim is to be paid in full; the rest to be paid *pro rata* from the assets. It then recites that the land is conveyed to complainants for the following uses and purposes:

"1. To assume possession thereof, to manage and rent, and out of the rents and proceeds of sale to pay taxes, insurance, liens and incumbrances, if any, and their reasonable expenses.

"2. To sell and convey said property, or any part or interest therein, and to make, execute, and deliver deeds of conveyance thereof, at such prices and upon such terms and conditions as they shall deem best.

"3. From the proceeds of rents and sales of said property, after the payment of accrued taxes, insurance, and expenses, to first pay the said claim of Nelson Holland, with interest, and from the remainder of such proceeds, as the same shall come to their hands, to pay the balance of said claims *pro rata*.

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"4. The surplus, if any, shall be paid to said James T. Hurst, or to such person or persons as he shall direct."

Then follows a description of the property.

The deed was duly executed, and recorded on the day of the execution at 3 o'clock p. m. On the same day the defendant levied an attachment upon this same property at 4:23 p. m. The land conveyed did not include all of Mr. Hurst's property, but only certain lands in Wayne county. Neither were the creditors therein provided for all his creditors.

The object of complainants' bill is to remove the cloud upon their title created by the attachment. Two objections are interposed on behalf of the defendant: (1) That the trust deed is, in effect, an attempted common-law assignment, and void as to all the creditors; and (2) that, if it is a mortgage security, it must be enforced by foreclosure as a mortgage, and, if a mortgage, the attachment levy must stand, because defendant is in that event entitled to redeem. Proofs were taken in open court, and decree entered for the complainants.

Russel & Campbell (*Harrison Geer* and *Henry M. Campbell*, of counsel), for complainants.

H. M. & D. B. Duffield, for defendant.

GRANT, J. (*after stating the facts*). This conveyance was before the United States circuit court of appeals, and was there attacked by the same counsel, and for the same reasons that are now urged against it. *Ontario Bank* v. *Hurst*, 43 C. C. A. 193, 103 Fed. 231. The instrument is there given in full, and an able opinion filed, written by Judge Day, in which various decisions of this court are cited and discussed. The conveyance was upheld.

We will not attempt a review of the many cases involving conveyances made to secure creditors. If there be any apparent conflict between the decisions on this important question, it is because of the difficulty in laying down

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and applying a conclusive test to each case. The rule is not in doubt. The difficulty lies in applying it. We reach the same conclusion as that reached by the federal court, and for the reasons therein stated. Whatever the decisions of other courts may be, it is the settled rule of this court that it is not a sufficient reason to set these conveyances aside that their effect is to hinder and delay other creditors, or even that the parties contemplated that other creditors might thereby be delayed in enforcing their debts. *McMorran* v. *Moore*, 113 Mich. 101 (71 N. W. 505); *Webber* v. *Webber*, 109 Mich. 147 (66 N. W. 960). The presumption is in favor of the validity of such instruments, and courts will ascribe to the parties thereto an honest, rather than an unlawful, purpose. *Palmer* v. *Mason*, 42 Mich. 146 (3 N. W. 945). Conveyances of land in trust to sell for the benefit of creditors are expressly authorized by statute. 3 Comp. Laws, § 8839.

By the instrument now in question, certain lands are conveyed to complainants for the sole purpose of selling them and paying the debts therein provided, and turning the surplus, if any, over to the grantor. The provision authorizing the trustees to rent does not invalidate the trust. The authority to rent is not in conflict with the authority to sell. Without this provision the trustees would have the same authority to rent previous to sale. As expressed in the deed, it means no more than that the trustees may rent until they can, in their judgment, sell to advantage. If such deed is not valid, the statute is of little use. Other creditors may have an interest in the surplus that remains, but they cannot reach it by attachment levy. It is clear that trust lands cannot be sold to advantage, if they can be sold at all, with an attachment levy made thereon. Such a conveyance is not a mortgage. It is an absolute conveyance of the title expressly authorized by statute, subject to be reconveyed to the grantor upon his paying the debts mentioned therein. It is in the nature of a mortgage, but is not a mortgage in fact, and does not require foreclosure proceedings. The trustees

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are entitled to have the property discharged from all subsequent levies, in order that they may carry out the power conferred upon them, and sell the property to advantage. We think the case of *Palmer* v. *Mason*, *supra*, rules this.

The decree is affirmed, with costs.

HOOKER, C. J., MOORE and MONTGOMERY, JJ., concurred.

BRUNICK v. ANN ARBOR RAILROAD CO.

RAILROADS—KILLING CATTLE AT CROSSING — CONTRIBUTORY NEGLIGENCE OF DRIVER—QUESTION FOR JURY.

Plaintiff's cattle, while crossing a railroad track in the highway, were killed by a wild engine. If the bell had been rung and the whistle sounded as required by the statute, plaintiff's two sons, who were driving the cattle, would have been able to prevent the accident. Just before reaching the track, the cattle stopped to drink at a pond. It did not appear that, if the drivers had at that time gone forward upon the track, they would have seen the engine, or that such precaution would have prevented the injury. *Held*, that whether the drivers were guilty of contributory negligence was a question of fact for the jury. GRANT, J., dissenting.

Case made from Wexford; Chittenden, J. Submitted November 21, 1902. (Docket No. 112.) Decided February 3, 1903.

Case by Everett Brunick against the Ann Arbor Railroad Company for the alleged negligent killing of plaintiff's cattle. There was a judgment for defendant on verdict directed by the court, and plaintiff assigns error. Reversed.

Sawyer & Bishop, for appellant.

T. W. Whitney, for appellee.

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MONTGOMERY, J. This is an action on the case, brought by Everett Brunick against the Ann Arbor Railroad Company, to recover the value of certain cattle killed by a wild engine on a highway crossing in the township of Richland. The whole case turns upon the question of contributory negligence, and there is practically nothing else involved, so far as the hearing in this court is concerned. On this particular evening the plaintiff's cattle were being driven along the highway by his two sons. When they came to this crossing, the cattle stopped to drink at a pond in the highway near the railroad track, and the boys waited for them to come out and proceed homeward. When they had finished drinking, they returned to the highway, and pursued their course, cattle fashion, one behind the other. When about half of them were over the track, this wild engine suddenly appeared, and struck them amidships, so to speak, killing some five or six of them, but leaving unharmed the cattle at either end of the procession.

It was the claim of the plaintiff that the boys were so situated that they could and would have been able to clear the track of these cattle in time for the engine to pass had the bell been rung and the whistle sounded in accordance with the statute, and that they were on the lookout for danger, and were exercising all the care possible with a large herd of cattle, and that the sole cause of the accident was the negligence of the trainmen in failing to give the proper warning of their approach. The defendant claimed that the boys were negligent in not going onto the track, and there waiting until the cattle had all passed. The circuit judge took this latter view of the case, and directed a verdict of no cause of action. The error complained of is in not leaving the question to the jury to say whether or not the boys were exercising ordinary care in the management of these cattle, and whether or not they were so situated that they could have prevented the accident had the proper signals been given.

We think the case presented a question of fact for the jury. The case is quite different from one of an attempt

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to cross a track with a team of horses, which the driver is presumed to have in hand and be able to control. There was no noise of a wagon to prevent these boys from hearing an approaching train. It is true, their view was obscured, but, had they gone to the track and looked when the cattle stopped to drink, and then returned to drive the cattle across the track, it is not clear that this precaution would have prevented the injury. True, the defendant's witnesses testify that the approaching engine could have been seen two miles away, as it passed Lucas; but, had they gone to the track to look when the cattle first stopped to drink, and then returned to drive the cattle, it is probable that they would not have seen the approaching engine. It was a still night, and they relied upon their sense of hearing and their knowledge that no train was due. The jury might have been justified in saying that this was negligent, but we think the question was for the jury. A case directly in point is *Bates* v. *Railroad Co.*, 4 S. Dak. 394 (57 N. W. 72). See, also, *Snook* v. *Clark*, 20 Mont. 230 (50 Pac. 718); 2 Thomp. Neg. (2d Ed.) § 2011.

Judgment will be reversed, and a new trial ordered.

HOOKER, C. J., MOORE and CARPENTER, JJ., concurred with MONTGOMERY, J.

GRANT, J. (*dissenting*). The facts in this case are undisputed. It was dark. Plaintiff's two sons were familiar with the situation, and knew and fully comprehended the danger at the crossing. Their vision was obscured, so that they could not see the headlight of an approaching engine. They stood 100 feet from the track while their cattle drank at the pond beside the road. As they drank they came back into the road, and walked, cattle fashion, towards the track. Standing at the crossing or near it, the headlight of the engine could be seen coming two miles distant. The negligence of the defendant in failing to blow its whistle and ring its bell is established by the finding of the jury.

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There is no dispute as to the rule of law. Where there is a conflict in the testimony, and where different minds may reasonably draw different conclusions from undisputed facts,—some that there is negligence, and others that there is not,—the question belongs to the jury to determine. The facts being undisputed, is this a case where reasonable minds can draw different conclusions? Can one mind reasonably say that the plaintiff's sons were not guilty of contributory negligence, and another that they were? This depends upon the determination as to what care they were required to take to protect the property in their charge, and as well to protect the property of the defendant, its employés and passengers. In case of a collision some of the cattle were sure to be killed or injured. The engine was liable to be derailed, causing injury to property, and injury, if not death, to defendant's employés. Yet the contention is made that these young men had the right to rely upon the absolute performance of duty by the defendant's engineer and fireman in giving the signals, and that they themselves had done all required of them when they stopped and listened 100 feet from the track, where they stood about five minutes. It cannot be successfully disputed that, without incommoding themselves, they might easily have prevented the accident. The two were not needed to drive the cattle along the road. One could have gone to the track and watched for a train, while the other waited until all the cattle had finished drinking, and then followed them up. Had they done so, the accident would certainly have been avoided. It is of no consequence that it was not time for a regular train. Every traveler is chargeable with knowledge that regular trains are often behind time; that sometimes they are run in sections; that special trains, and what are known as "wild" trains and "wild" engines, are run over these railroads, and must, of necessity, be run in order to do the work required of them. *Vincent* v. *Steamship Co.*, 48 La. Ann. 933 (20 South. 207, 55 Am. St. Rep. 287). Therefore the duty to take at least ordinary precautions

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for one's own safety and the safety of those upon the trains is required of every traveler in making these crossings. The circuit judge, in directing a verdict, used the following language:

"It would seem that these young men, standing there for five minutes, if they desired to run that risk, and stay there, waiting for the bell to ring or the whistle to blow, that they were certainly guilty of negligence. They had plenty of opportunity—they had five minutes, according to their testimony—to go to the track and look up and down, and see whether there was any danger in the cattle crossing the track. Instead of doing that, they stood 100 feet from the track, allowed the cattle to drink from this water hole, pass out, and rove over the track, without taking any precaution on their part to see whether an engine or a train was coming; and it seems to me that, under these circumstances, they did not use and employ all reasonable means at their disposal to ascertain whether there was any danger in the cattle crossing the track."

Here we have two persons, travelers, in charge of a large herd of cattle; not one person in charge, as was the case in *Bates* v. *Railroad Co.*, 4 S. Dak. 394 (57 N. W. 72). In that case the decision was by a majority of the court. In the majority opinion it was held that the evidence tended to show negligence, but did not establish it so conclusively as to justify the court in deciding it as a matter of law. The only act of contributory negligence claimed was in failing to go forward to the track and ascertain whether a train was approaching. Justice Corson filed an able dissenting opinion, in which he gives the testimony of the plaintiff in full, and cites many authorities to sustain his position. In *Snook* v. *Clark*, 20 Mont. 230 (50 Pac. 718), the highway led through a narrow canon. The right of way was not fenced, and the negligence charged was a failure to fence the right of way and to maintain a cattle-guard. The cattle were evidently killed on the right of way, and not in the highway. The contributory negligence claimed was "in driving his stock into the canon without taking proper steps to avoid coming in collision with the train," and in not riding down the track to stop

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the train by flagging when he heard it approaching. It was held that he could not have flagged the train without exposing his life in riding along a deep and dangerous cut. These cases are so different in their facts that I do not regard them as authority in this case.

If these two young men had been driving six heavily loaded teams, tied together, one after the other, or if they had been so well broken as not to require a driver, but would follow without being tied to the team in front, would they have been justified in stopping 100 feet from the track to listen, and then walking behind the teams the rest of the way to the track, assuming that no train would come? Or, if these cattle had been tied together, with a leader in front, and they had stopped at the same distance to listen, and then driven on, both drivers being behind, would that have been the exercise of due diligence? Would not common prudence dictate that one should be in front of the procession, and the other in the rear, when they were about to cross the track? The fact that the cattle were loose does not change the rule of law. If anything, they were bound to greater care when they were loose, because they would be more beyond their control than when tied together. I deem it unnecessary in this case to discuss the question of the duty of one traveler driving cattle along the highway. That is not this case. Here were two. One could have gone ahead, while the other remained, and thus have secured the passage in perfect safety. I think it was their clear duty to do so.

I think the judgment should be affirmed.

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POLLOCK v. GERMAN FIRE-INSURANCE CO.

1. FOREIGN CORPORATIONS—REGULATION OF BUSINESS OF FIRE-INSURANCE COMPANIES.
   An insurance corporation organized in another State can only be admitted to do business in this State upon such terms as this State may see fit to impose.

2. SAME—CONSTITUTIONAL PRIVILEGES.
   The imposition of terms upon an insurance company of another State not imposed upon insurance companies organized in this State does not violate the fourteenth amendment to the Constitution of the United States.

3. SAME.
   2 Comp. Laws, § 7246, does not violate the fourteenth amendment to the Constitution of the United States, in imposing conditions upon insurance companies of other States not imposed upon insurance companies of this State; the courts of this State having adopted the same rule in regard to domestic corporations.

Error to Wayne; Hosmer, J. Submitted January 7, 1903. (Docket No. 8.) Decided February 3, 1903.

Assumpsit by Henry B. Pollock, Charles A. Pettibone, and William H. Chapman, copartners as Pollock, Pettibone & Chapman, against the German Fire-Insurance Company of Pittsburg, Pennsylvania, on a policy of insurance. From a judgment for plaintiffs on verdict directed by the court, defendant brings error. Affirmed.

Tarsney & Fitzpatrick, for appellant.

Fred H. Warren, for appellees.

GRANT, J. For a statement of this case, see 127 Mich. 460 (86 N. W. 1017).

Upon the second trial the court below directed a verdict for the plaintiffs. The facts in this record are identical

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with those upon the former record, except in one particular. Upon the second trial two witnesses, clerks in the office of Mr. Gaukler, testified that they received no communication from Bierce & Sage by telephone notifying him that plaintiffs were moving, and desired to have their policy transferred. These two witnesses were the only two lady clerks in Gaukler's employ at the time. Mr. Sage testified that he called up Gaukler's office by telephone; that a lady answered the call, and he gave her the information. It appears from the testimony that telephonic communications with Mr. Gaukler's office upon the subject of insurance were almost daily; that a book was kept, in which to record these requests or orders; and that no order or request appeared upon the book. Mr. Sage's testimony is positive that he did have a conversation with a clerk in Mr. Gaukler's office, and gave her the information. It is not improbable, notwithstanding the positive testimony of these two witnesses, that Mr. Sage did communicate the request to one of them. Their testimony is based to a great extent upon the fact that they were accustomed to enter such requests upon the record book, and that no such entry was found. But this question becomes immaterial, in view of the decision at the former hearing. We there held distinctly that Bierce & Sage were the agents of the defendant. There is nothing in this case to change the facts upon which that opinion was based. It has, therefore, become the law of the case.

The only new question presented is, in the language of defendant's counsel:

"If the effect of the statute in this case is to make Bierce & Sage the agents of the defendant, and to conclude the defendant by their acts, then it violates the fourteenth amendment of the Constitution of the United States, and is void, * * * because it singles out foreign fire and inland navigation insurance companies, and imposes upon them in the conduct of their business legitimate terms, conditions, restrictions, and limitations that are not imposed upon domestic companies transacting like business in this State, or upon other foreign companies."

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The clause of the statute referred to reads as follows:

"The term 'agent' or 'agents,' used in this section, shall include any acknowledged agent, surveyor, broker, or any other person or persons who shall in any manner aid in transacting the insurance business of any insurance company not incorporated by the laws of this State." 2 Comp. Laws, § 7246.

This contention cannot prevail. "The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created." *Paul* v. *Virginia*, 8 Wall. 168, 181. "It [the corporation] must dwell in the place of its creation, and cannot migrate to another sovereignty." *Bank of Augusta* v. *Earle*, 13 Pet. 588. It follows, and such is the universal current of authority, that corporations can only be admitted to do business in other States than those where created upon such terms as those States may see fit to impose. Usually no such conditions are imposed upon home corporations. *Philadelphia Fire Ass'n* v. *New York*, 119 U. S. 110 (7 Sup. Ct. 108); *Crutcher* v. *Kentucky*, 141 U. S. 59 (11 Sup. Ct. 851); *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 395 (20 Sup. Ct. 962); *Pembina Consol. Silver Mining & Milling Co.* v. *Pennsylvania*, 125 U. S. 181 (8 Sup. Ct. 737); *Home Ins. Co.* v. *Davis*, 29 Mich. 240; *Hartford Fire Ins. Co.* v. *Raymond*, 70 Mich. 501 (38 N. W. 474); *First Nat. Bank of Detroit* v. *Burch*, 80 Mich. 247 (45 N. W. 93); *Moline Plow Co.* v. *Wilkinson*, 105 Mich. 57 (62 N. W. 1119). The statute does no more than to provide who shall be the agent or agents of these foreign insurance corporations doing business within this State. Aside from this, however, we think the objection is not valid because the courts of this State have virtually adopted the same rule in regard to domestic corporations. *McGraw* v. *Insurance Co.*, 54 Mich. 145 (19 N. W. 927).

The judgment is affirmed.

The other Justices concurred.

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LOWRY *v.* PAW PAW SAVINGS BANK.

1. CHANCERY APPEAL—FINDINGS OF COURT.

In a chancery case, where the question is a doubtful one, the Supreme Court will give great weight to the findings of the circuit court on questions of fact, but will examine the case *de novo*, and, if satisfied that a different conclusion should have been reached, will reverse the decree.

2. COLLATERAL SECURITY—DISCHARGE OF MORTGAGE—ACCOUNTING.

Complainant assigned a mortgage to a bank as collateral security for a loan of less than the amount of the mortgage. The bank foreclosed the mortgage, which it afterwards discharged upon receipt of only the amount due it on the loan. *Held*, that the evidence showed that the mortgage was discharged at the request of complainant, and that a bill for an accounting for the difference between the amount of the loan and the mortgage could not be maintained against the bank.

Appeal from Van Buren; Yaple, J., presiding. Submitted January 13, 1903. (Docket No. 27.) Decided February 3, 1903.

Bill by George Lowry against the Paw Paw Savings Bank for an accounting. From a decree for complainant, defendant appeals. Reversed.

Thomas J. Cavanaugh, for complainant.

A. Lynn Free and *Lincoln H. Titus*, for defendant.

MOORE, J. This is a bill to compel an accounting. From a decree granting the prayer of the bill, defendant has appealed.

This bill was filed the latter part of March, 1900. The record discloses that on January 15, 1887, complainant borrowed of defendant $100, giving his note therefor, and assigned to said bank, as collateral security, a mortgage dated September 27, 1886, for $400, due in five years,

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given by James Lowry and wife to George Lowry. This assignment was put upon record in the office of the register of deeds. The complainant did not pay his debt when it became due, and the assigned mortgage was foreclosed by advertisement, and the land mentioned therein was sold to Mr. Free, the cashier of the bank; the sheriff's deed running to John W. Free, trustee. It was dated May 28, 1888, and was duly recorded. This sale was redeemed from January 2, 1889. The bank was paid the amount due it from complainant, and on the same day Mr. Free, as cashier, executed a marginal discharge of the mortgage in the office of the register of deeds. An entry was also made on the margin of the record of the sheriff's deed that the land had been redeemed and the deed destroyed. On the 15th day of January, 1895, Mr. Free wrote on the margin of the record of the assignment that he, as cashier, had received payment of the debt secured by the assignment, and on the margin of the record of the mortgage that it was through an error the previous marginal entry of a discharge of the mortgage was made.

As early as January, 1889, James and Elizabeth Lowry sold the land described in the mortgage to Alvin and Theckla Bennett; making no mention in the deed of the mortgage given to George Lowry. In August, 1897, George Lowry filed a bill in chancery to foreclose the mortgage of September 27, 1886; making, among others, Mr. Bennett defendant. He obtained a decree in his favor in the court below, but in this court (*Lowry* v. *Bennett*, 119 Mich. 301 [77 N. W. 935]) Mr. Bennett prevailed. A reading of that case will aid somewhat in understanding this one. The opinion in that case was handed down in January, 1899, and this case for an accounting was commenced, as before stated, in March, 1900. It is complainant's claim that Mr. Breck, acting for the bank, commenced the foreclosure proceedings that resulted in a sale of the premises to Mr. Free as trustee; that his brother James paid the money which redeemed from this sale; that Mr. Free had no right to discharge the mortgage,

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but should have discharged the assignment of the mortgage; that complainant had no knowledge this discharge had been made until long afterwards, and was unable to recover the note he had given for the debt of $100, and the papers he assigned as collateral security, until at or about the time of the death of Mr. Breck, who died December 11, 1894; that James Lowry and his wife are insolvent; that, as this court has held Mr. Bennett obtained the land free from this mortgage, the bank should be held to account to him for the amount of said mortgage and interest, the same as though it had been paid to the bank.

It is the claim of the bank that Mr. Breck, though a director of the bank, was acting for complainant in making this loan; that, when the redemption was made, the bank received only what was due it on the $100 loan and interest; that the money was paid to the bank either by the complainant, or by Mr. Breck in his presence, and at the same time the $100 note and the other papers were delivered to the complainant, and that it was at the request of the complainant the mortgage was discharged; that this was done because it had been paid; that the later entries were made in the office of the register of deeds at the request of the complainant, who claimed the previous entries had been made by mistake; and that complainant made no claim until shortly before this suit was brought that the bank had done anything for which he had a cause of action against it.

The record shows that James Lowry died in 1889. Mr. Richardson, who examined the records when Mr. Bennett obtained his deed of the premises, died in December, 1896. Mr. Bennett died in June, 1899. The record also shows that in July, 1886, George Lowry and his wife gave to Alvin Bennett and Theckla A. Bennett a mortgage for $700, which mortgage was foreclosed, and the land described therein sold, and redeemed by the payment of $767 on the 29th of March, 1889.

A great many interesting questions are argued by coun-

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sel to meet the varying phases of the case. Each party claims that, upon the question of fact, the court should find with it. It is also claimed by the complainant that the bank is Mr. Lowry's trustee, and the statute of limitations would not begin to run until the bank repudiated the trust by refusing to account to him. It is the claim of the defendant that the trust ended, and the statute of limitations began to run, when the mortgage was discharged, in 1889, and that, in any event, it began to run when Mr. Lowry obtained the papers, as early as the fall of 1893, from Mr. Breck, and, as this suit was not commenced until March, 1900, it was commenced too late.

It is not necessary to pass upon all these questions. In a chancery case, where the question is a doubtful one, this court will give great weight to the finding of the lower court upon questions of fact, where the witnesses are examined in open court; but nevertheless this court must examine the case *de novo*, and, where it is satisfied the complainant has failed to make a case, it is the duty of this court to dismiss the bill of complaint. The court is of the opinion the complainant has not established his case. His own testimony is contradictory. In the bill of complaint he filed against Mr. Bennett, probably to excuse his laches in commencing the suit, he swore he was unable to secure the papers from Mr. Breck or the bank until after the death of Mr. Breck. Upon the trial of this case he swore he obtained them from Mr. Breck, probably the year before his death. In the former bill he swore:

"Your orator further shows that afterwards, and on or about the 2d day of January, 1889, he caused the said $100 and all interest thereon to be paid to said Paw Paw Savings Bank, and then and there requested the said Paw Paw Savings Bank to discharge the assignment of the mortgage; but, notwithstanding said request, the said John W. Free, cashier of said Paw Paw Savings Bank, caused to be entered upon the records of said mortgage in the register's office for Van Buren county the words and figures following, viz.:

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"'In consideration of the full payment of all moneys secured to be paid, I hereby discharge the same of record, as cashier of the Paw Paw Savings Bank.

"'January 2, 1889.

"'JOHN W. FREE,

"'Cashier of Paw Paw Savings Bank.

"'In presence of

"'J. D. MONROE,

"'Register.'"

In this case he testified that he did not pay the money to the bank, and was not present when it was paid, and did not request Mr. Free to go to the register's office at that time, but that all that business was attended to by James Lowry, and that he did not get the papers he had assigned to the bank until as above stated.

Mr. Lowry was not a wealthy man. As before shown, in July, 1886, he gave a mortgage for $700, which was foreclosed, and which he redeemed in March, 1889. In 1887 he was a borrower from the bank. He was not able to pay, or at least he did not pay, this debt when it matured. It was not until after the mortgage he had assigned as collateral security had been foreclosed that this debt was paid. If at this time he still had an outstanding interest of three or four hundred dollars in the mortgage his brother gave him, he would have insisted, when his debt to the bank was paid, on the mortgage being delivered to him. His brother James died in 1889. The mortgage he had given to George became due in September, 1891, though it had a provision giving James the right to pay $100 or more at the end of any year after two years from its date. According to the testimony of the complainant, this mortgage was upon property worth ten or twelve hundred dollars, and James died insolvent; and yet complainant took no steps to collect this mortgage until in 1897. It appears from the testimony of complainant that in the other case Mr. Bennett testified that George Lowry was present when Mr. Bennett had Mr. Richardson examine the title, at the time he bought the land from James, and pronounced the land free from

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incumbrances, and then made no claim he had a mortgage upon the land. This testimony was disputed by complainant. There is no claim the bank had any interest in this mortgage, except to the amount of $100 and the interest, or that it received anything else. It had no reason for making any discharge, except such a one as would be proper under the then situation. The cashier testified that, when the bank was paid its money, the note and other papers were delivered over to the complainant, and the mortgage was, at his request, discharged. This discharge was made January 2, 1889, and on the 30th of the same month James Lowry and his wife conveyed the premises by warranty deed to Mr. Bennett. It is improbable they would have done this if their mortgage to George was yet unpaid. It is not until six years later that any claim is made to the bank that a mistake was made, and the mortgage was discharged when only an assignment of the mortgage should have been discharged. The record evidence in the case, and the acts of the parties cognizant of the facts at the time they occurred, are consistent with the claim of the cashier, and inconsistent with the claim of complainant.

The decree of the court below is reversed, and one will be entered here dismissing the bill of complaint, with costs of both courts.

HOOKER, C. J., CARPENTER and MONTGOMERY, JJ., concurred. GRANT, J., did not sit.

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MILLER *v.* McLAUGHLIN.

MORTGAGES—FORECLOSURE—MULTIFARIOUSNESS—PARTIES.

A bill to foreclose a mortgage is not multifarious for making former owners of the mortgage, who have guaranteed payment of the principal and interest of the mortgage debt, and also conveyed certain other lands to secure such payment, parties defendant, together with persons who have given or held additional security and subsequent mortgagees and grantees, where one and the same debt is secured by the original mortgage and all subsequent agreements.

Appeal from Wayne; Hosmer, J. Submitted January 13, 1903. (Docket No. 29.) Decided February 3, 1903.

Bill by Sidney T. Miller, trustee, against Joseph R. McLaughlin, Robert J. McLaughlin, Collins B. Hubbard, Anna Georgina Hubbard, George Dingwall, and others, to foreclose certain mortgage securities. From an order overruling demurrers to the bill, defendants Hubbard and Dingwall appeal. Affirmed.

This is a suit to foreclose certain mortgage securities. The bill is long, and sets forth in full the various instruments which are the subject of controversy. The following brief statement, however, is sufficient to an understanding of the question raised by the defendants:

1. A note and mortgage in 1893 were made by the defendants McLaughlin, together with two others (Yemans and Owen), to Margaret Woodbridge. Yemans parted with his interest in the land, and died some time afterwards, and Owen died, leaving a widow, now defendant Louise M. Jebb. The debt was originally for $121,115, but had been reduced to about $118,000 before the mortgagee transferred it.

2. Margaret Woodbridge sold the note and mortgage to Collins B. Hubbard and George Dingwall July 24, 1895.

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A day later they, in turn, sold to George L. Beecher and Luther S. Trowbridge, administrators, etc., and at the time of sale gave a written guaranty of the payment of both principal and interest. This guaranty runs from Hubbard and Dingwall to Beecher and Trowbridge and their assigns. Margaret Woodbridge, as further security, and at the same time, conveyed by warranty deed to the Union Trust Company of Detroit certain lands set forth in the declaration of trust made by the said Margaret.

3. Contemporaneously with the guaranty, and as a security for its fulfillment, a deed was given Beecher by Hubbard and wife and Dingwall and wife of certain lands in Detroit, and Beecher gave back a memorandum stating that the lands were held by him as security for the debt and for the performance of the guaranty agreement.

4. Edmund J. Owen, one of the original mortgagors, died, and the entire debt was proved against his estate. On December 1, 1896, an arrangement was made between Beecher and Trowbridge, on the one side, and all of the parties liable on the debt, on the other side, by which the claim against the estate was withdrawn, and Mrs. Owen and John V. Moran, who had bought an interest in the land, became personally liable for the debt, and all existing agreements were continued in force. Hubbard and Dingwall were parties to the agreement.

5. On September 9, 1898, the complainant in this suit bought the chain of security, and another agreement was executed, which Hubbard and Dingwall signed. This agreement transferred the guaranty and security from Beecher to complainant, and preserved in force all securities, so far as here concerned.

Mrs. Dingwall died before foreclosure.

To the bill asking the foreclosure of this debt and relief against the various debtors, the defendants Hubbard and wife and Dingwall interposed demurrers for multifariousness, claiming they were interested only in the land described in the instruments referred to in paragraph 3 of this statement. Decree was entered overruling the demurrers.

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Miller, Smith, Alexander & Paddock, for complainant.

Earl D. Babst (*Willis G. Clarke*, of counsel), for appellants.

GRANT, J. (*after stating the facts*). One and the same debt is secured by the original mortgage and all the subsequent agreements and deeds set up in the bill of complaint. They are interwoven with each other, and the last agreement made recited them all, and preserves them all in force. All these agreements relate to, and all parties are interested in, the same subject-matter,—some as guarantors, some as having given additional security, and some as subsequent mortgagees or grantees. Besides, Hubbard and Dingwall, by their agreement of July 25th with Beecher and Trowbridge, were personally liable for the debt under their guaranty, and in it had provided for a foreclosure of the mortgage deed given by them to Beecher. We think the case is ruled by *Torrent* v. *Hamilton*, 95 Mich. 162 (54 N. W. 634), and authorities there cited, and *Michigan State Bank* v. *Trowbridge*, 92 Mich. 217 (52 N. W. 632). It is also clearly within the statute (1 Comp. Laws, § 519), which is quoted in full in *Michigan State Bank* v. *Trowbridge*, 92 Mich. 222 (52 N. W. 633). The case of *Hart* v. *McKeen*, Walk. Ch. 417, has no application. In that case there were three distinct debts, three distinct mortgages, and three distinct mortgagees. So, for the same reason, *Eastern Building & Loan Ass'n* v. *Denton*, 13 C. C. A. 44, 65 Fed. 569, does not apply. There two mortgages were given to the same person to secure different loans on separate lots. Subsequently the mortgagor deeded the two lots to different persons.

The decree is affirmed, with costs, and the case remanded for further proceedings.

The other Justices concurred.

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RICK v. SAGINAW BAY TOWING CO.

1. NEGLIGENT INJURY—INTERSTATE LAW—MASTER AND SERVANT.
The liability of a master to his servant for a negligent personal injury is governed by the law of the place of the injury.

2. SAME—FELLOW-SERVANTS—CANADIAN STATUTE.
A Canadian statute making an employer liable for an injury to a workman caused by the negligence of a servant who has any superintendence intrusted to him, or to whose directions the workman was bound to conform, is not contrary to the public policy of this State, and will be applied in a case where the injury occurred in Canadian territory.

3. SAME—DUTIES OF MATE OF VESSEL.
The owner of a vessel cannot escape liability for an injury to a servant on the ground that the mate gave general directions, and the injury resulted from the misuse by a fellow-servant of the material provided, where there is evidence that it is the duty of the mate to attend to any work he orders done, and to see that it is done himself, and that he is hired for that purpose.

4. NEGLIGENCE—DEATH BY DROWNING—QUESTION FOR JURY.
Where a plank staging let down over the side of a vessel was held by a rope in such a manner as to allow it to tip, whereby a seaman fell into the water and was drowned, when the customary manner of fastening the rope would not permit it to tip, the question of negligence should be submitted to the jury.

5. SAME—CONTRIBUTORY NEGLIGENCE.
Where a seaman, whose death was occasioned by the tipping of a plank swung by ropes at the side of the vessel, could only have known how the ropes were fastened by a minute and careful examination, it was error to direct a verdict for the defendant on the ground that he was guilty of contributory negligence in descending to the staging to do the work he was ordered to do.

Error to Bay; Shepard, J. Submitted October 15, 1902. (Docket No. 55.) Decided February 16, 1903.

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Case by Elizabeth Rick, administratrix of the estate of Ferdinand Rick, deceased, against the Saginaw Bay Towing Company, for negligently causing the death of plaintiff's intestate. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Crane & Crane and *R. A. McKay*, for appellant.

Simonson, Gillett & Clark, for appellee.

MONTGOMERY, J. This action, which was based upon the Canadian statute hereinafter referred to, is brought to recover damages resulting from causing the death of plaintiff's intestate by negligence. The decedent was in the employ of the defendant as a wheelsman on board its tug Charleton. The declaration charges that one Brown was acting as mate of the Charleton at the time of the accident, and that Brown ordered the crew, consisting of the deck hands and decedent, who was wheelsman, to throw over the staging and scrape the outside of the tug. The staging or scaffold upon which this work was to be performed consisted of a plank 14 or 15 feet long, 12 to 16 inches wide, with cleats near either end, 5 feet long, nailed to the plank at right angles, so that on either side there was an extension of nearly 2 feet, and the staging, when suspended, would be by these cleats held away from the side of the tug. When the order to scrape down the side of the boat had been given, the testimony tends to show, the decedent went to get a pail or pails, and other members of the crew, including one Crow, swung the staging over. When decedent returned, they were putting the staging over. There was testimony tending to show that the customary way was to use two lines for this purpose. On the occasion in question but a single line was used, with a loop at either end, into which the end of the plank was inserted. The result was that, when swung, there was nothing to prevent the plank or platform from tipping, and there was testimony from which the inference could be drawn by the jury that it was because of the tipping of

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the plank that the decedent was thrown into the water and drowned. At the close of the plaintiff's case the circuit judge directed a verdict for the defendant, apparently upon the two grounds: That the decedent was a fellow-servant of the one responsible for the swinging of the staging (and whether he deemed responsibility to rest upon the mate, Brown, or upon Crow, is not quite apparent from the record), and also upon the ground of contributory negligence. Upon this ruling the plaintiff assigns error.

A large number of interesting questions are presented in the brief of the learned counsel for the defendant. The question of first importance—the one which meets us at the threshold of the case—is whether the Canadian statute upon which the plaintiff relies is to be enforced in its entirety in this State. This statute dispenses with the immunity of the employer from liability for the negligence of a fellow-servant when personal injury is caused to a workman "by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence, or by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed." 1 Rev. Stat. Ont. 1897, chap. 160, § 3, subds. 2, 3. It is the contention of the defendant that, while the courts have frequently stated the rule that cases of personal injury are governed by the law of the place of the injury, this rule is subject to the qualification that the foreign statute, which, under the doctrine of comity, is to be enforced in this State, must not be against the public policy of the State, and that the phrase "public policy" has not the same meaning as in criminal jurisprudence, and that the public policy of the State of the forum depends merely upon whether the right conferred in the State where the injury took place is similar to the right conferred under like circumstances in the State where the

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action is brought. Authorities may be found which, perhaps, will sustain this contention in its entirety; but the tendency of the modern decisions is to hold that, before the court of any State is justified in refusing to enforce a right of action accruing under the laws of any other State or country, it must appear that such right is against good morals or natural justice, or that for some other reason an enforcement of it would be prejudicial to the general interest of the citizens of the State of the forum, and that it does not follow that, because the statute differs from the law of the forum, it is contrary to the public policy of the State, within the meaning of this rule. See 22 Am. & Eng. Enc. Law (2d Ed.), 1379, 1380; Rorer, Interst. Law (2d. Ed.), p. 217 *et seq.; Dennick* v. *Railway Co.*, 103 U. S. 11; *Hanna* v. *Railway Co.*, 41 Ill. App. 116. For an able and learned opinion, reviewing the authorities, see *Herrick* v. *Railway Co.*, 31 Minn. 11 (16 N. W. 413, 47 Am. Rep. 771).

Defendant's counsel cite and rely upon the case of *Bettys* v. *Railway Co.*, 37 Wis. 323, which was decided in connection with *Anderson* v. *Railway Co.*, 37 Wis. 321. The court in *Herrick* v. *Railway Co.* refuse to follow the latter case, and point out, we think very clearly, that by the weight of modern authority the rule contended for by the plaintiff in this case is the prevailing rule. We hold, therefore, that the plaintiff's rights are to be determined by the law of Canada. See *Wingert* v. *Wayne Circuit Judge*, 101 Mich. 395 (59 N. W. 662); *Turner* v. *St. Clair Tunnel Co.*, 111 Mich. 578 (70 N. W. 146, 36 L. R. A. 134, 66 Am. St. Rep. 397). We do not overlook the contention of the defendant that this action is a penal action. We do not so regard it, and think the contention sufficiently answered by the reasoning of the court in *Huntington* v. *Attrill*, 146 U. S. 657 (13 Sup. Ct. 224).

Was there negligence on the part of the mate in directing the work of swinging this scaffold, and in permitting it to be done in the manner in which it was? Defendant contends that there was not; that he might give gen-

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eral directions, and if there was material with which the work could be done at hand and on the boat, as the evidence tends to show was the case here, he would not be liable for the misuse by the fellow-servants of the deceased of the material which he had supplied. *Rawley* v. *Colliáu*, 90 Mich. 31 (51 N. W. 350); *Erickson* v. *Mining Co.*, 130 Mich. 476 (90 N. W. 291). There would be force in this contention but for the fact that there is testimony by the witness Bridge, who was a sailor on the tug Howard, to which the Charleton was fastened at the time of the accident, and who had himself been a mate on schooners, and was familiar with the duties, to the effect that it is rulable for the mate to attend to any work which he orders done, and to see that it is done, and to oversee the work himself; that that is what a mate is hired for. We think this testimony sufficient to raise a question for the jury as to whether a neglect of duty on the part of the mate was a cause of the injury.

The testimony that the staging was not properly swung is, to our minds, very clear. If two lines had been employed, one at either end of the staging, as is customary, or if a single line had been employed, and had been drawn around the cleat at either end, it would have been impossible for the plank to tip up, and the injury would not have happened, so that there was negligence in swinging the plank in the manner in which it was swung is hardly open to dispute; at least, it opened a fair question for the jury.

But the defendant contends that the decedent assumed the risk, as, it is said, the manner in which this staging was swung was open to his observation. It is true that, by a minute inspection, he could have known that the rope was not fastened around the cleats; but it would have taken a somewhat careful investigation to show this, standing upon the deck as the staging was swung. In our opinion, it was not a case in which the court should have withdrawn from the jury the question of whether the decedent was negligent in descending to this staging to do the work which he had been ordered to do.

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We think the views expressed furnish sufficient guidance for a retrial of the case, and direct that the judgment be reversed, and a new trial ordered.

HOOKER, C. J., MOORE and GRANT, JJ., concurred.

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MAHAN *v.* MICHIGAN TELEPHONE CO.

1. TELEPHONE COMPANIES — MUNICIPAL CORPORATIONS — ORDINANCES.

Although a telephone company has a right to maintain a telephone exchange in a city under reasonable rules and regulations made by the city, yet it may, by accepting an ordinance, enter into contractual relations with the city, and be bound to perform the terms and conditions of the ordinance.

2. SAME — ASSIGNEE — RATES.

Where a telephone company accepts a franchise containing a provision that its terms and conditions shall be binding upon any assignee, and that the assignee shall operate its lines under the ordinance, a competing telephone company which purchases all its tangible property, including the rights under the franchise, will be bound to furnish service to subscribers of the selling company at the rates fixed by the ordinance.

3. SAME — MANDAMUS.

Mandamus is a proper remedy to compel a telephone company to furnish a subscriber connections through its exchange.

Certiorari to Wayne; Brooke, Frazer, Carpenter, Hosmer, and Rohnert, JJ. Submitted June 17, 1902. (Docket No. 41.) Decided February 17, 1903.

Mandamus by John Mahan to compel the Michigan Telephone Company and the Detroit Telephone Company to furnish service to relator. From an order granting the writ, respondents bring *certiorari*. Affirmed.

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James H. Pound, for relator.

W. E. Thompson (*Wells, Angell, Boynton & McMillan* and *D. F. Morgan*, of counsel), for respondents.

MONTGOMERY, J. The opinion of the circuit judges, prepared by Judge Brooke, states the issue and discusses the points involved in this case so clearly that we quote it at length:

"This is a petition by the relator against the respondent the Michigan Telephone Company for a writ of *mandamus* to compel said respondent to give petitioner access to the subscribers to the telephone system owned and operated by the Michigan Telephone Company in the city of Detroit. The facts of the case may be briefly stated as follows: For some years prior to the 14th day of March, 1896, the respondent the Michigan Telephone Company had owned and operated in the city of Detroit a telephone exchange. Upon the said 14th day of March, 1896, the respondent the Detroit Telephone Company secured a franchise from the city of Detroit, and said franchise was on said date accepted by said respondent the Detroit Telephone Company. Under said franchise the respondent the Detroit Telephone Company proceeded to install a telephone exchange in the city of Detroit, and secured, from time to time, subscribers, so that, at the time the contract was entered into with the relator by the respondent the Detroit Telephone Company, there were upwards of 5,000 subscribers to said system. The petitioner, Mahan, had a contract with the respondent the Detroit Telephone Company, running for a period of five years, and bearing date the 25th day of August, 1899, which had not expired, by about two years, at the time the acts complained of were committed by the respondents.

"On the 6th of April, 1900, the respondent the Detroit Telephone Company executed a bill of sale whereby, for a valuable consideration, it transferred to the respondent the Michigan Telephone Company all of its tangible property, including some 5,200 telephones, and also including all rights under said franchise from the city of Detroit of March 14, 1896. Soon thereafter the purchasing company, the Michigan Telephone Company, caused the two exchanges to be connected; and from that time up to the 1st day of December, 1901, subscribers to either system

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were given access, not alone to the system to which they subscribed, but to all subscribers of the other system. On or about the 1st day of December, 1901, the Michigan Telephone Company notified all subscribers to the Detroit Telephone Exchange that after that date connection with the Michigan Company's subscribers could not be had, and since that time the Michigan Company has refused to furnish to the Detroit Telephone subscribers connection with the Michigan Company's subscribers. Demand has been made by the relator upon the Michigan Company for such connection, and has been refused. During the period between April 6, 1900, when the number of telephones in use by the Detroit Telephone Company was over 5,000, and the 1st day of December, 1901, when the number in use by the patrons of that company was reduced to something like 300, agents of the Michigan Telephone Company endeavored to induce users of the Detroit Telephone to discontinue the same and use only the Michigan Telephone. At the time the petition was filed in this case the Detroit Telephone users had become further diminished to about 90, and, at the time the argument was heard, it had been further reduced, as was asserted by counsel for petitioner, which statement was unchallenged by counsel for either respondent, to about 21.

"Two questions are raised by the pleadings in this case which have already been determined, viz.: (1) The propriety of the remedy; and (2) the reasonableness of the rate charged by the respondent the Michigan Company. As to the first question, this court has already determined that *mandamus* is a proper remedy, and, as to the second, it has determined that the rates charged by the Michigan Company are not fairly in issue in this proceeding. The sole question, therefore, remaining for determination, is whether or not the petitioner is entitled, under the pleadings and proofs, to the writ of *mandamus* to compel the respondent the Michigan Company to give him, a subscriber to the Detroit Telephone Exchange, access to the subscribers of the Michigan Telephone Company in the city of Detroit.

"Section 14 of the ordinance of March 14, 1896, running to the Detroit Telephone Company, is as follows:

"'If the said company shall, at any time during the term of this franchise, transfer its rights to any other telephone company now operating in Detroit, or make any consolidation with such company, the company acquiring such rights, or the consolidated company,

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shall be subject to the terms and conditions of this ordinance, and shall operate its lines under this ordinance.'

"Section 15 of said ordinance is as follows:

" 'All the rights, liabilities, and obligations herein granted or imposed upon said company shall apply to and be operative in favor of or against any assignee or successor of said company.'

"The above-named respondents, the Michigan Telephone Company and the Detroit Telephone Company, are organized under the provisions of chapter 177 of the Compiled Laws, section 4 of which act provides the manner in which telephone companies may operate within the State of Michigan. Counsel for respondents claim that sections 14 and 15 of the ordinance were never binding upon the respondent the Detroit Telephone Company, and cite in support of their contention *Michigan Telephone Co.* v. *City of St. Joseph*, 121 Mich. 502 (80 N. W. 383, 47 L. R. A. 87, 80 Am. St. Rep. 520). In that case the complainant's assignor, the Telephone & Telegraph Construction Company, presented a petition to the common council of the village of St. Joseph for permission to construct, maintain, and operate a telephone system in said village. The permission was duly granted by the village, and the company proceeded, at large expense, to erect poles and stretch wires within the lines of the streets and alleys in said village until June 5, 1891, when the village became incorporated as a city. The complainant in that case, being the respondent the Michigan Telephone Company in this case, duly acquired by purchase all the property, rights, and privileges of said construction company, and continued to do business in said city until August 3, 1897, when it erected, in a good and workmanlike manner, and in accordance with the terms of the statute under which it was organized, certain poles in said city, for the purpose of connecting with its central office the premises of persons who had subscribed for telephone service. On said August 3, 1897, the common council passed a resolution declaring said poles and wires a nuisance, and instructed the street commissioner to forthwith remove them, which he did. On August 10 and 16, 1897, the complainant presented two petitions to the common council, asking permission to erect poles in certain specified streets and alleys. The council refused permission. Under these facts, in an opinion by Justice GRANT, it was held that it was the clear duty of the defendant to act upon the petitions presented to its common council by the complainant, and to

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establish reasonable rules and regulations for the erection of poles and the stretching of wires.

"The other case cited by respondents' counsel is the case of *Michigan Telephone Co.* v. *City of Benton Harbor*, 121 Mich. 512 (80 N. W. 386, 47 L. R. A. 104), and it only differs from the case last cited in that the assignor of the complainant never had permission granted to it to erect its poles or string its wires in the city; and in that case it was held, as in the case last cited, that the common council of the defendant city should provide, by ordinance or otherwise, reasonable regulations for the erection of the poles and stretching of the wires of the complainant.

"In the case first cited (*Michigan Telephone Co.* v. *City of St. Joseph*) the following language occurs in the opinion by Justice GRANT:

> "'It is urged that the permission granted to the Telephone & Telegraph Construction Company was personal to that company, and could not be alienated without the consent of the city. That company was organized under a general law of the State, and derived its powers and obligations from that law. The only power which a city could have exercised over it was that of regulation.'

"Under the principles laid down in the decisions just cited, it is quite apparent that had the Detroit Telephone Company applied to the common council of the city of Detroit to fix, by ordinance or otherwise, reasonable rules and regulations under which it might proceed, by virtue of the power granted in the act under which it was organized, to erect its poles, string its wires, and establish a telephone exchange in the city of Detroit, the court would have compelled compliance with the demand. That, it seems to us, is all that the cases in question determine. But can it be said that, because the Detroit Telephone Company had the right to insist upon the city of Detroit making reasonable rules and regulations under which it should establish and operate its telephone exchange in the city of Detroit, it was thereby precluded from entering into contractual relations with the city of Detroit touching the terms and conditions under which it should erect and operate its said exchange? It seems to us obvious that this cannot be so. The right of the city to make the contract in the premises cannot be questioned. Neither can it be questioned that the Detroit Telephone Company had the right, as well as the power, to make a contract with reference to the erection, maintenance, and operation of its

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exchange. An examination of the ordinance in question discloses the fact that in section 1 of said ordinance the right is given by the city to the respondent the Detroit Construction Company to lease, to any other company having similar rights to itself, the right to use poles and conduits of the respondent the Detroit Construction Company. This is clearly a concession, and presumably a valuable one, to the grantee in the franchise, and is clearly outside any rights which it could claim under the authority of the general law which it now invokes.

"Upon the day of the passage of said ordinance, the respondent the Detroit Construction Company accepted said ordinance in the following terms:

"'DETROIT, March 19, 1896.

"'TO THE MAYOR AND COMMON COUNCIL:

"'The Detroit Telephone Construction Company accepts the ordinance granted to said company, approved March 14, 1896.

"'The DETROIT TELEPHONE CONSTRUCTION COMPANY,

"'By CHARLES FLOWERS, Vice-President.

"'By order of the board of directors.'

"The passage of said ordinance by the common council, its approval by the mayor of the city of Detroit, and its acceptance by the company, constitute, in our opinion, a binding contract between the company or its assigns and the city of Detroit. The company acted under the ordinance, and installed its exchange thereunder, and the citizens of the city of Detroit, to a large number, became subscribers thereto; and we do not understand it is claimed that the respondent the Detroit Telephone Company could have at any time itself repudiated any of the terms of the ordinance under which it did business for several years.

"The sole question remaining for determination, therefore, is, Did the respondent the Michigan Telephone Company, by its act in acquiring by the bill of sale all the tangible property of the Detroit Telephone Company, as well as all its rights under the franchise in question, coupled with its action thereafter, become fixed with the duties and obligations with which the Detroit Telephone Company was charged under said franchise? We think it did. The respondent the Michigan Telephone Company must be held to have entered into the purchase with full knowledge and notice of the franchise in question, and all the conditions and obligations assumed by its grantor

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thereunder, and it cannot now enjoy the benefits thereof without also assuming the obligations incident thereto. Strength is added to this view by the action of the respondent the Michigan Telephone Company immediately after said purchase, as tending to show what construction it itself placed upon said franchise and the obligations incident thereto. Immediately after the purchase by it of the tangible assets of the Detroit Company and its franchise rights, access was given by it to the subscribers of the Detroit Telephone Exchange to the subscribers to the Michigan Exchange. Users of the Detroit Telephone Company accepted this service and paid for the same for a period of something like a year and a half. We are of the opinion that the furnishing of the service by the respondent the Michigan Company, and the acceptance thereof by the subscribers to the Detroit Company, if it did not constitute a new implied contract between the Michigan Company and said subscribers, at least furnishes a construction of the terms of the ordinance by the parties themselves which the respondent the Michigan Telephone Company is not now at liberty to repudiate."

We are satisfied with the reasoning of the foregoing opinion, and adopt it.

It is contended in this court that *mandamus* is not a proper remedy, but we agree with the learned circuit judges that that remedy is open. Merrill, Mandamus, § 162.

The order will be affirmed.

HOOKER, C. J., MOORE and GRANT, JJ., concurred.

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SHERMAN v. SPALDING.

1. LANDLORD AND TENANT—MONEY HAD AND RECEIVED.
The owner of land cannot, under a count for money had and received, recover, from a person to whom the tenant has attorned, the rent paid by the tenant.

2. SAME—GUARANTY.
Defendant leased certain premises, and agreed to save the tenant harmless from loss or damage on account of an adverse claim of ownership made by plaintiff. After plaintiff's right had been established, the tenant assigned to her his claim for rent paid under the lease. She then brought suit against defendant for the money paid by the tenant. *Held*, that she could not recover under the guaranty, as no suit for damages had been brought against the tenant.

Error to Wayne; Rohnert, J. Submitted October 8, 1902. (Docket No. 19.) Decided February 17, 1903.

Assumpsit by Mary Sherman against Hinton E. Spalding for money had and received. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Charles C. Stewart, for appellant.

Walker & Spalding, for appellee.

GRANT, J. For a full statement of this case, see 126 Mich. 561 (85 N. W. 1129).

1. Plaintiff cannot maintain this action upon the theory of money had and received by the defendant for her benefit. There was no contractual relation between them growing out of the contract between Mr. Fisher and the defendant. Neither expressly nor impliedly did defendant promise to hold the money paid him by Fisher for Mrs. Sherman. She had a contract with Fisher, and by that her rights and damages for its violation must be measured. Defend-

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ant had a contract with Fisher, and by that defendant's and Fisher's rights must be determined. At the time the lease and contract of guaranty were made between Fisher and defendant, defendant in good faith believed that he had the title, under the judgment of the court in *Walker* v. *Fisher*. The court had so decided. That decision was reversed on appeal to this court. 117 Mich. 72 (75 N. W. 144). Fisher was willing to accept him as a landlord, and in good faith made the agreement to pay the rent to defendant. Under these circumstances, an action by plaintiff for money had and received will not lie. *Corey* v. *Webber*, 96 Mich. 357 (55 N. W. 982).

2. Plaintiff's right of action, if she has any, against defendant, depends upon the contract between the defendant and Fisher, and the assignment of the same by Fisher to plaintiff. The contract reads as follows:

"Agreed by and between H. E. Spalding, of the first part, and Truman S. Fisher, of the second part, that second party hereby rents of the first party the premises No. 578 Lincoln avenue, Detroit, from date to May 1, 1898,—the rent being paid in advance to March 1st,—at $12.00 per month; and the second party also to pay the water tax from November 1st, '97, to May 1st, '98. First party guarantees to save second party harmless from any loss or damage on account of the claim for possession set up by Mary Sherman, or any other persons claiming under the title set up by her."

The assignment reads as follows:

"For valuable consideration, I hereby assign and set over to Mary Sherman all my right, title, and interest in and to an account paid by me to Hinton E. Spalding for rent of No. 578 Lincoln avenue from November 1, 1897, to June 1, 1898, and hereby empower said Mary Sherman to collect the said account, amounting to the sum of eighty-four dollars."

This assignment is based upon the theory that defendant had $84 in his possession belonging to Fisher, or that defendant owed Fisher that amount. Defendant did not contract to pay the money he received as rent from Fisher

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back to him upon the determination of the suit of *Walker* v. *Fisher* in this court adversely to Walker. He contracted simply and solely to hold Fisher harmless from any loss or damage he might suffer on account of Mrs. Sherman's claim. When Fisher had suffered damage, then, and then only, did defendant agree to respond. Plaintiff has no greater right than Fisher had. This contract cannot be construed with reference to what Mrs. Sherman might or might not do in case the suit of *Walker* v. *Fisher* was decided in favor of Fisher. It is unambiguous, and all prior conversations are merged in it. She might bring suit against Fisher, or she might not. If she brought suit and recovered, the defendant would be obliged, under his contract of guaranty, to pay the amount of the damages recovered. If she should not bring suit against him (Fisher), then he has not been damnified. She has not brought such suit, and therefore Fisher has not been damnified. Should Mrs. Sherman sue him, he would notify defendant of that suit, and it would be the defendant's duty to defend it. Under this contract of guaranty, defendant is entitled to be heard in, and, if he choose, to defend, any suit which Mrs. Sherman might bring against Fisher to recover the rent she claims to be due. He cannot be deprived of this right by the assignment of the contract to Mrs. Sherman.

I think the direction of the court was right, that the judgment should be affirmed, and this expensive litigation over a small amount ended. It is so ordered.

HOOKER, C. J., MOORE and MONTGOMERY, JJ., concurred.

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McCHESNEY *v.* WILSON.

1. DOGS—TRESPASSING—RIGHT TO KILL.
   The fact that a dog is a trespasser does not in itself justify a person in killing him.
2. SAME—NUISANCE—QUESTION FOR JURY.
   Where a person killed a dog which had killed his chickens and continually committed nuisances about his premises, the question of his liability should have been submitted to the jury, to determine whether the killing was reasonably necessary under all the circumstances.
3. EXEMPLARY DAMAGES—PUNISHMENT.
   It is error to instruct the jury that exemplary damages include damages given for the purpose of punishment.

Error to Missaukee; Chittenden, J. Submitted October 9, 1902. (Docket No. 27.) Decided February 17, 1903.

Case by Samuel W. McChesney against Ari W. Wilson for the alleged willful killing of plaintiff's dog. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Reversed.

This suit originated in justice's court, and was appealed to the circuit court, where plaintiff recovered a verdict and judgment for $20 for the value of his dog, which was shot and killed by the defendant. The dog was on the defendant's premises, and in the act of urinating through a screen cellar window, at the time he was shot. He had killed three of defendant's chickens and eaten one. He was in the habit of frequently urinating through the defendant's screen door onto his carpet. Defendant and his wife had frequently driven him away with clubs. Defendant testified that once, when he and his wife were going at night to feed the pigs, the dog stood in the path, and would not let her pass, and that she had to pick up a

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stick and drive him away. He notified plaintiff of all these acts on the part of his dog. Two neighbors testified that the dog had killed some of their chickens, and that they notified him of the fact; and one testified that he told him he would kill the dog if he did not keep him away, and that plaintiff asked him why he did not. Plaintiff admitted that he had killed some of his own chickens. Plaintiff did not deny that the defendant and the others notified him of the acts of his dog. It is true plaintiff testified that his dog was a bird dog, but did not testify that he or any one else had ever hunted with him. The dog's disposition for birds and for hunting then appears from plaintiff's cross-examination, as follows:

"*Q.* Now, you say that this dog was a bird dog?
"*A.* Yes, he was subject to that.
"*Q.* He had a kind of leaning towards chickens, didn't he?
"*A.* Oh, yes.
"*Q.* That's the kind of a bird dog he was,—he killed chickens?
"*A.* Yes, he killed some in my yard."

The court directed a verdict for the plaintiff, leaving the jury only the question of damages. Defendant interposed no defense in the justice's court.

U. S. Albertson, for appellant.

F. O. Gaffney, for appellee.

GRANT, J. (*after stating the facts*). The court instructed the jury that the defendant was not justified in killing the dog, unless he was in the act of chasing, killing, or annoying his sheep or other domestic animals. The following facts are conclusively established:

1. That the dog was a killer of domestic fowls.
2. That he was a frequent trespasser upon the premises of the defendant, and frequently committed the disgusting nuisance above mentioned.
3. That plaintiff was notified by the defendant and others of the disposition of his dog.
4. That he took no steps to restrain him.

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Evidently the attention of the learned circuit judge had not been called to the cases of *Hubbard* v. *Preston*, 90 Mich. 221 (51 N. W. 209, 15 L. R. A. 249, 30 Am. St. Rep. 426), and *Throne* v. *Mead*, 122 Mich. 273 (80 N. W. 1080, 80 Am. St. Rep. 568), otherwise I think he would have directed a verdict for the defendant. Under the principle laid down in these decisions, the defendant was justified in killing the dog. That there is property in dogs, for which the owner may recover in a proper case, is conceded; but this does not authorize a party to keep a dog of the character of the one in this case, who almost daily commits a nuisance at his neighbor's house, and kills and destroys his neighbor's domestic fowls. No statute is needed to justfy the injured party in killing a dog of this character when he appears upon the premises, after notifying the owner of his depredations, and giving him ample time to take care of him. Whether the statute (2 Comp. Laws, § 5592) is broad enough to include domestic fowls it is unnecessary to decide. See *Marshall* v. *Blackshire*, 44 Iowa, 475.

This is not a case where a dog is found for the first time committing a nuisance in trespassing, or in killing fowls or animals. This is not the case of *Bowers* v. *Horen*, 93 Mich. 420 (53 N. W. 535, 17 L. R. A. 773, 32 Am. St. Rep. 513), where the offense with which the dog was charged was in walking over a freshly painted porch, and once being found in a henhouse without doing any damage, and in going around the defendant's house at night, chasing cats into trees, and barking. In that case stress was laid upon the fact that the defendant, knowing who the owner was, failed to notify him that the dog gave him any annoyance. Had the defendant in that case done so, a different result might have been reached, under the decision of *Hubbard* v. *Preston*, *supra*.

Some stress is laid upon the fact that the defendant kept two dogs himself, one a male and the other a female. No complaint, however, is made against these dogs. The

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only testimony in regard to them is that the male dog was about a year old, and was kept tied up in defendant's barn, and that the female dog was a puppy, four months old, and was also kept within doors. The fact that defendant kept dogs which annoyed no one affords no excuse for plaintiff's keeping a vicious dog.

The law, in my opinion, justified the defendant in killing this dog. One desiring to keep such a dog because of his companionship, of his ability to perform amusing tricks, and even render some valuable service, such as bringing in sticks of wood, and carrying notes to his master, must at least keep him off his neighbor's premises. In *Hamby* v. *Samson*, 67 Am. St. Rep. 285 (s. c., 105 Iowa, 112, 74 N. W. 918, 40 L. R. A. 508), will be found a valuable note collating the authorities on this question. They are not harmonious, and many of the decisions are based upon statutes.

Judgment reversed, and new trial ordered.

HOOKER, C. J. The plaintiff recovered a verdict and judgment for $20 for the killing of his dog by the defendant, who admits that he shot him. The reason given upon the trial was that, on the occasion of the shooting, the dog was in the act of urinating upon a cellar window screen at defendant's house, and defendant testified that he had on one or more occasions urinated through a screen door upon a carpet in his house, and that he was in the habit of urinating upon the exterior of the house. He also testified that he had some time previous killed three chickens belonging to him. There was testimony that he was a bird dog, and had killed chickens for one or more other neighbors. There was no claim that he was pursuing chickens on the occasion of the shooting. There was also testimony that he disturbed defendant at times by his barking. The defendant has appealed.

I concur in the opinion that the judgment must be reversed because the court took from the jury the question whether the killing of the dog was justifiable, and directed

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a verdict for the plaintiff, and because the jury were instructed that exemplary damages *include damages given for the purpose of punishment*, though it may be doubtful if any such damages were allowed by the jury.

The day has gone by when a dog is an outlaw, and his master remediless when he is wantonly killed. Many dogs are valuable, and many cases so hold. It is not an open question in this State, as the cases hereinafter cited will show. See, also, *Wheatley* v. *Harris*, 4 Sneed, 468 (70 Am. Dec. 258); *Parker* v. *Mise*, 27 Ala. 480 (62 Am. Dec. 776); *Dodson* v. *Mock*, 20 N. C. 146 (32 Am. Dec. 677); *Nehr* v. *State*, 35 Neb. 638 (53 N. W. 589, 17 L. R. A. 771); *Bowers* v. *Horen*, 93 Mich. 420 (53 N. W. 535, 17 L. R. A. 773, 32 Am. St. Rep. 513). The statute gives the right to kill dogs which worry sheep, and perhaps it is not correct to say, as an abstract proposition, that the only time a person is justified in killing a dog is when he is chasing, killing, or annoying sheep or other domestic animals. The fact that a dog is a trespasser does not *in itself* justify one in killing him. See *Marshall* v. *Blackshire*, 44 Iowa, 475; *Corner* v. *Champneys*, Taunton Lent Assizes 1814, mentioned in 2 Marsh. C. P. 584; *Sosat* v. *State*, 2 Ind. App. 586 (28 N. E. 1017); *Brent* v. *Kimball*, 60 Ill. 211 (14 Am. Rep. 35). Circumstances may be such as to justify the killing of a trespassing dog. *Lipe* v. *Blackwelder*, 25 Ill. App. 119; *King* v. *Kline*, 6 Pa. St. 318; *Dunning* v. *Bird*, 24 Ill. App. 270. Again, the barking or howling of a dog does not justify killing him if it can be otherwise prevented. *Brill* v. *Flagler*, 23 Wend. 354. The same rule applies as to chasing animals. We have a stringent statute for the protection of sheep. But it has no application to this case, and the rule cited above has application to other animals. Thus, the fact that a dog has worried cattle does not justify killing him. *Hinckley* v. *Emerson*, 4 Cow. 351 (15 Am. Dec. 383); *Spray* v. *Ammerman*, 66 Ill. 309; *Vere* v. *Cawdor*, 11 East, 568; *Janson* v. *Brown*, 1 Campb. 41; *Leonard* v. *Wilkins*, 9 Johns. 233; *Liver-*

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more v. *Batchelder*, 141 Mass. 179 (5 N. E. 275); *Wright* v. *Ramscot*, 1 Saund. 84; *Boecher* v. *Lutz*, 13 Daly, 28. In Illinois it is held that the relative value of the dog and the animal attacked by him is to be considered in determining the right to kill the dog for the protection of the animal. *Anderson* v. *Smith*, 7 Ill. App. 354. See, also, note to *Hubbard* v. *Preston*, 15 L. R. A. 249, 30 Am. St. Rep. 426 *et seq.* (S. C., 90 Mich. 221, 51 N. W. 209).

It has been said that the cases of *Hubbard* v. *Preston* and *Throne* v. *Mead*—both Michigan cases—required the circuit judge to direct a verdict for the defendant. *Hubbard* v. *Preston* will be found to hold that, under an exasperating combination of circumstances, a man has a right to protect himself from a nuisance by killing a dog, and in such case it is for a jury (not the court) to decide whether the killing was a reasonable means of abating the nuisance. In the case of *Bowers* v. *Horen*, 93 Mich. 420 (53 N. W. 535, 17 L. R. A. 773, 32 Am. St. Rep. 513), Mr. Justice GRANT held that "the law does not justify the killing of a neighbor's valuable dog because he has left tracks on a freshly painted porch, has been found on one occasion in the henhouse, and has come around the house at night, chased cats into the trees, and barked." In that case attention is called to the fact that the defendant did not inform the owner that the dog annoyed him, and the same might have been found to be true by the jury in this case, had it been left to them, and if it is important. The case of *Throne* v. *Mead* involved the question of sheep and the statute, and was rightly decided, but does not affect this case.

The testimony tends to show that this was a useful and valuable dog; that the defendant himself kept a dog, and also a bitch, upon his premises. There was a dispute about the habits of the dog as to staying at home. On the other hand, the defendant testified to many annoyances; that he deliberately shot the dog, but did not intend to kill him, and was sorry he had done so, because it had made him so many enemies. Under these circumstances

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the question should have gone to the jury to say whether the shooting of this dog was, under all of the circumstances, reasonably necessary.

The other question involves the measure of damages. Our understanding is that the rule in this State limits exemplary damages to the aggravation of the injury to feelings which arises from malice, and does not permit damages for the purpose of punishment. In the justice's court the plaintiff recovered $100, which was reduced to $20 upon the trial in the circuit. There is little reason for believing that any punitory damage was allowed, but it is possible that the defendant was injured by this instruction.

For the reasons given, I concur in the reversal of the cause.

MOORE and MONTGOMERY, JJ., concurred with HOOKER, C. J.

COVENEY *v.* PHISCATOR.

1. DURESS—IMPRISONMENT—PLEA OF GUILTY.
   A person who pleads guilty to a charge of obtaining money by means of threats, and returns the money he had received as a condition of his release, cannot recover the money on the ground that it was paid under duress of imprisonment.

2. FOREIGN JUDGMENT—REGULARITY—PRESUMPTION.
   A judgment of a Canadian court will be presumed to have been regular, and within the jurisdiction of the court.

3. SAME—COLLATERAL ATTACK.
   A plaintiff who has, in a Canadian court, pleaded guilty to a charge of obtaining money by means of threats, and, in voluntarily returning the money, has anticipated the order of restitution authorized by the Canadian statute, cannot, in an action to recover the money as paid under duress, in the absence of fraud, show that he was not properly adjudged guilty.

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Error to Berrien; Coolidge, J. Submitted October 14, 1902. (Docket No. 53.) Decided February 17, 1903.

Assumpsit by Joseph E. Coveney against Frank Phiscator for money alleged to have been paid under duress of imprisonment. From a judgment for plaintiff, defendant brings error. Reversed.

Alfred J. Mills and *Lawrence C. Fyfe*, for appellant.

O'Hara & O'Hara and *Victor M. Gore*, for appellee.

MONTGOMERY, J. This is an action to recover $7,000 and interest, claimed to have been paid defendant under duress of imprisonment. The plaintiff recovered, and defendant brings error.

The case of plaintiff, briefly stated, is that he charged defendant with having maintained illicit relations with his (plaintiff's) wife; that this alleged offense occurred in Berrien county, in this State; that plaintiff pursued defendant to the latter's residence at Dawson, Yukon Territory; that defendant then and there paid $7,000 in satisfaction of the injury; that very soon thereafter plaintiff was arrested by the Yukon authorities for obtaining this money of defendant by means of threats and menaces; that plaintiff was kept in jail on this charge from the 26th of May until the 10th of July, when he obtained his release and discharge by signing a retraction of the charge which he had made against Phiscator, surrendering the money to the marshal to be returned to Phiscator, and entering a plea of guilty to the charge of extortion by means of menaces and threats, whereupon the district court of Yukon suspended judgment on plaintiff's agreeing to leave the Territory.

A careful reading of the record does not disclose that Phiscator had aught to do with the rigor of treatment of which plaintiff complains. The most that can be asserted is that Phiscator appeared as a witness on the preliminary examination, and it might possibly be properly inferred

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from the circumstances that he, or some one in his behalf, lodged a complaint with the public authorities prior to plaintiff's arrest. However this may be, we discover no evidence in the record that the defendant sought to compel the plaintiff to surrender this money, unless the lawful institution of these proceedings be held to have constituted such an attempt. The plaintiff's testimony shows that he had two lawyers, and that he acted on their advice in pleading guilty.

The record of the criminal proceedings is not produced. The presumption is that such proceedings were regular, and within the jurisdiction of the court. *Palmer* v. *Oakley*, 2 Doug. 433 (47 Am. Dec. 41); 13 Am. & Eng. Enc. Law (2d Ed.), 995. The law of the forum authorized the court, in case the plaintiff, Coveney, had been found guilty as charged, to summarily order restitution to Phiscator of the money obtained by means of the threats and menaces which were the subject of that action. 24 & 25 Vict. chap. 96, § 100; 2 Rev. Stat. Canada, p. 2062. The plaintiff anticipated any such order, which would have followed on his plea of guilty as a matter of course, by turning the money into the hands of the marshal, to be returned to Phiscator. Can the plaintiff, having thus solemnly acknowledged his guilt and made restitution according to the laws of that Territory, and having by his plea of guilty shown both the legality and the propriety of the arrest, now assert that such arrest amounted to duress of imprisonment? We think that to permit him to do so would be to admit of a collateral attack upon the judgment of a court having jurisdiction of the matter. This, according to the weight of modern authority, is not permissible. 2 Black, Judgm. § 829. Whether such judgment is impeachable for fraud in a collateral attack is open to some question. Id. § 844.

Plaintiff contends that his plea of guilty in the criminal proceeding is not conclusive of his guilt in a civil action, and cites cases in which this doctrine is laid down, where the question arises in an action based upon a wrong which

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is also an offense against the public. An illustrative case is *Hauser* v. *Griffith*, 102 Iowa, 215 (71 N. W. 223), which was an action for personal injury by assault. It was held that a previous plea of guilty in a criminal action was not conclusive. But cases of this character do not meet the issue here. The question here more properly is whether *the judgment of conviction is conclusive that the plaintiff was properly adjudged guilty*, or whether the plaintiff can assert that a proceeding in which that was regularly determined constituted unlawful duress *because the plaintiff was not in fact guilty*, as it was determined he was. This is a collateral attack upon the finding of the court, and nothing else. Whether we adopt the rule that this jurisdiction may impeach the Yukon judgment for fraud, or hold that such an attack must be made there, the result in this case is the same; for, if we eliminate the claim that plaintiff was guiltless of the offense of which he was there charged, there remains no testimony in any way tending to show that any fraud was practiced upon the plaintiff. It may be safely stated that, wherever it is held that a judgment of a foreign country may be impeached for fraud, it is maintained that the fraud meant is a fraud practiced in the very obtaining of the judgment. Black, Judgm. § 844.

Had the plaintiff, in lieu of the present proceeding, instituted a suit for malicious prosecution, it would have been essential to show that the proceedings in the Yukon terminated favorably to himself. 19 Am. & Eng. Enc. Law (2d Ed.), p. 685. And this is equally true of a prosecution in a foreign country. *Castrique* v. *Behrens*, 107 E. C. L. 709; *Pratt* v. *Page*, 18 Wis. 337. And while it is said that imprisonment under valid process and for a just cause is duress if such imprisonment is unlawfully used to obtain the contract (*Morse* v. *Woodworth*, 155 Mass. 233 [27 N. E. 1010, 29 N. E. 525]), we are not able to discover in this record any evidence of unlawful use of the process in the Yukon Territory with which defendant was connected. The testimony of plaintiff

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shows that he was treated like other persons. No suggestion of a confession was made to him by defendant. On the contrary, the plaintiff, without either consulting his own counsel or the defendant, wrote defendant offering to return the money and drop the thing forever if defendant would get him out of jail. It does not appear that, even after this letter was received, defendant had anything to do with his release. Plaintiff's attorney advised him, and he finally acted upon this advice in pleading guilty to the charge and surrendering the money. If we eliminate the probative force of the plaintiff's testimony that he was not in fact guilty of extortion as charged, we have not a shadow of testimony showing any unlawful or oppressive act of defendant. On this record, verdict for defendant should have been directed.

Judgment will be reversed, and a new trial ordered.

HOOKER, C. J., MOORE and GRANT, JJ., concurred.

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COLE *v.* AUDITOR GENERAL.

1. TAXATION—COURTS OF CHANCERY—LIMITATION OF POWERS.
   1 Comp. Laws, § 8893, in limiting the power of a court of chancery to set aside decrees rendered in tax proceedings, is valid.

2. COURTS OF CHANCERY—POWERS.
   The court of chancery has power to open its decrees to correct errors.

3. TAX SALES—CERTIFICATE OF ERROR—POWER OF AUDITOR GENERAL.
   Subdivision 3 of section 98 of the general tax law (1 Comp. Laws, § 3921), providing that the auditor general may issue a certificate of error where the sale was in contravention of any provision of the act, applies only to errors occurring after the decree, and not to a case where the lands were held as State tax lands at the time the tax petition was filed.

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4. SAME—OVERRULED CASES.

Gurd v. *Auditor General*, 122 Mich. 151, in so far as it sustains the power of the auditor general to review and set aside proceedings prior to the decree in a tax case, is overruled.

Appeal from Ontonagon; Haire, J. Submitted November 20, 1902. (Docket No. 216.) Decided February 17, 1903.

Bill by Thomas F. Cole against Perry F. Powers, auditor general, to restrain the issuance of a certificate of error. From a decree for complainant, defendant appeals. Affirmed.

C. E. Miller, for complainant.

Horace M. Oren, Attorney General (*Charles W. McGill* and *M. J. Sherwood*, of counsel), for defendant.

GRANT, J. The respondent was about to issue a certificate of error upon a tax-title deed issued to the complainant. The main reason for issuing it is that, at the time of filing the petition, the lands were held as State tax lands, and that therefore the sale was void under *Connecticut Mut. Life-Ins. Co.* v. *Wood*, 115 Mich. 444 (74 N. W. 656). Other objections are also urged. Complainant thereupon filed this bill to enjoin this proposed action on the part of the respondent, and a decree for a permanent injunction was rendered.

The respondent bases his right to issue such certificate on section 98 of the general tax law (1 Comp. Laws, § 3921), which authorizes him to issue such certificate for four reasons: (1) That the land was not subject to taxation; (2) that the taxes had been paid to the proper officer; (3) "that such sale was in contravention of any of the provisions of the act;" (4) that a certificate that no taxes were charged against the lands was given by the proper officer within the time limited by law for the payment or redemption thereof. The respondent claims his right to act under the third subdivision above cited, and insists that, under it, it is in his

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power to go back of the decree of the court, and review the validity of any of the prior proceedings. In support of this contention he relies mainly upon *Gurd* v. *Auditor General*, 122 Mich. 151 (80 N. W. 1005). The extraordinary power which the respondent claims for himself must be found to be expressly conferred upon him by statute, or it does not exist. It is certainly a very extraordinary power. It may be conceded that the legislature, in conferring this jurisdiction upon courts of chancery,—a jurisdiction which they possess solely by virtue of the statute,—might lodge in the auditor general the power to review the proceedings. We will determine only the question whether it has done so in the present law.

The reason for a change in the tax system of this State is not unimportant. Under the laws prior to 1891, deeds issued under tax proceedings were notoriously invalid. The legislature sought to remedy this evil by Act No. 200 of the Public Acts of 1891, and Act No. 206 of the Public Acts of 1893, the main features of which are the same as those in the law as it now stands. The object was to give every taxpayer his day in court, so that he might early contest before the court all questions as to the validity of his taxes, and thus secure a better collection of the public revenues. There is little, if any, excuse for a landowner's failure either to pay his taxes, or to contest them in the proceeding instituted for that purpose. As we said in *Cole* v. *Shelp*, 98 Mich. 56 (56 N. W. 1052), every man knows that his land is subject to taxation, and that proceedings will be taken to foreclose the tax lien. Failing to appear when the opportunity is afforded him, he has little cause to complain against the result. The two provisions of the tax law in regard to setting aside the decrees, sales, and deeds thereunder are found in section 98, above cited, and also in section 70 (1 Comp. Laws, § 3893), which section provides that:

"The practice with reference to setting aside such sale shall be the same, so far as applicable, as in a sale in equity on the foreclosure of mortgages: *Provided*, no sale shall

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be set aside for inadequacy of price, except upon payment of amount bid upon such sale, with interest and costs: *And provided* further, that no sale shall be set aside after confirmation, except in cases where the taxes were paid, or the property was exempt from taxation. In such cases the owner of such lands may move the court at any time within one year after he shall have notice of such sale to set the same aside, and the court may so order upon such terms as may be just."

Under this clause the taxpayer may appear at any time before confirmation of the sale, and interpose any objection he may have to the decree, and after confirmation his right to have the sale set aside is limited to cases where he has paid his taxes or where his property was exempt from taxation. He must proceed under this clause within one year after he shall have notice of the sale. We held that a decree might be set aside upon a petition in the same suit after one year, where the court had no jurisdiction to enter the decree, and the petitioner showed equities and proper diligence. *Aztec Copper Co.* v. *Auditor General*, 128 Mich. 615 (87 N. W. 895), and cases there cited. It is evident that the legislature sought to limit the power of the court in chancery to set aside decrees rendered in these proceedings. The right of the legislature to so limit the power cannot be questioned. This court has recognized that provision of the law as valid, and has only apparently extended it, where parties have not applied within one year, to cases where the court itself determines that there was no jurisdiction to enter the decree.

If the contention in behalf of the respondent prevail, it must follow that the legislature deliberately conferred upon the auditor general unlimited power over the decrees of the court, while it placed limitations upon the jurisdiction of the court. That the legislature intended to confer upon the auditor general the power to determine the question of jurisdiction, which the court had passed upon, seems hardly probable. A serious question would arise in that event, viz., whether such act of the auditor general would not be judicial rather than ministerial. Sections 70

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and 98 must be construed together. It is apparent that the grounds numbered 1, 2, and 4, upon which the auditor general is authorized to issue certificates of error, involve circumstances under which a taxpayer is justified in paying no attention to the tax proceeding, because his land is then either not subject to taxation, or, if it is, he has paid the taxes, or has a certificate that no taxes were charged against him. The taxpayer, under these circumstances, naturally would know nothing about proceedings to sell his land until he was actually notified. He then produces to the auditor general his certificate or receipt, or proof that the land was not subject to taxation. The authority of the auditor general to issue certificates or to withhold deeds, under these three subdivisions, has been upheld in many cases. *Hand* v. *Auditor General*, 112 Mich. 597 (71 N. W. 160); *Kneeland* v. *Wood*, 117 Mich. 174 (75 N. W. 461); *Wood* v. *Bigelow*, 115 Mich. 123 (73 N. W. 129); *Youngs* v. *Auditor General*, 118 Mich. 550 (77 N. W. 5); *Mann* v. *Carson*, 120 Mich. 631 (79 N. W. 941); *Northrup* v. *Maneka*, 126 Mich. 550 (85 N. W. 1128); *Kneeland* v. *Auditor General*, 113 Mich. 63 (71 N. W. 477).

The power of the court in chancery to open its decree to correct errors is not disputed. This is inherent in the court, and is also conferred by the statute. So suits in equity may be brought, under the proper circumstances, which involve the validity of the proceedings. There are many such cases. *Visscher* v. *Ottawa Circuit Judge*, 116 Mich. 666 (74 N. W. 1013); *Aztec Copper Co.* v. *Auditor General*, *supra*; *Kneeland* v. *Hyman*, 118 Mich. 56 (76 N. W. 127); *Muirhead* v. *Sands*, 111 Mich. 487 (69 N. W. 826); *Hough* v. *Auditor General*, 116 Mich. 663 (74 N. W. 1045); *Carpenter* v. *Jones*, 117 Mich. 91 (75 N. W. 292); *Thomas* v. *Auditor General*, 120 Mich. 535 (79 N. W. 812).

It is conceded by the attorney general that *Jackson* v. *Sloman*, 117 Mich. 126 (75 N. W. 282), was based upon subdivision 1 of section 98, and not upon subdivision 3.

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I find, then, but one case where the auditor general has been held authorized to set aside a decree for defects previous to the decree, or for other reasons than the three specific ones mentioned in subdivisions 1, 2, and 4, and that is the case of *Gurd* v. *Auditor General*, 122 Mich. 151 (80 N. W. 1005), where the publication of the petition and order was held void because published in a newspaper printed in a foreign language. A notice of sale is essential where lands are sold under the decrees or judgments of courts. Usually the notice is subsequent to the decree. Under the tax proceedings, the publication of the petition and order as provided in sections 62 and 66 is anterior to the decree, and serves two purposes: (1) To give the court jurisdiction; and (2) to operate as an advertisement of the sale. The short brief of the attorney general in the *Gurd Case* questioned the power of the auditor general to refund the money paid in that case until the question had been determined by a court of competent jurisdiction, but did not discuss it. The question principally argued by the attorney general was that the State executed a quit-claim deed, and in no way warranted the title. If the point had been made in the chancery proceeding, and the court had held that the publication was valid, would the auditor general have the power to set aside the decree of the court in chancery? Could the contesting taxpayer ignore the decree, and appeal to the auditor general to reverse it? The auditor general certainly possesses no more power over a decree upon default than upon one rendered after a contest. Because the court in chancery may set aside its decree for the reason that the lands had previously been bid in by the State does not authorize the auditor general to set aside a decree for the same reason. It must be conceded that the language we used in the *Gurd Case* justified the respondent in concluding that he had the power under subdivision 3. It might, perhaps, properly be held that the order published in that case was the notice of sale, and that, where fatal defects of jurisdiction appear upon the face of any such proceeding, it renders

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any judgment or decree based thereunder absolutely void. The illustration made by my Brother MOORE in his opinion in that case is an apt one, viz., that, if no notice had ever been published, the proceedings would have been void. It would not in that case have required any action on the part of the auditor general or on the part of the court to declare them void. Proceedings void upon their face are an absolute nullity, and would be inadmissible as a basis for any right.

To what, then, can subdivision 3 be held to apply? The language applies to the sale. There may be errors of various kinds occurring after the decree, when the power of the court of chancery is ended. In *Connecticut Mut. Life-Ins. Co.* v. *Wood*, *supra*, there were defects made after the decree and at the time of entering the decree. See page 454, 115 Mich. (paragraph 6 of the opinion). We are of the opinion that the statute must be held to apply to cases of this character, and not to those matters which are involved in and are foreclosed by the decree of the court. In several cases we have used language directly holding that the decree of the court upon all those matters necessarily involved in the proceedings cannot be attacked collaterally. In *Muirhead* v. *Sands*, *supra*, which was a bill filed by the complainant, the owner of the tax deed, to quiet his title, after disposing of five objections, we said, speaking through Justice MONTGOMERY:

"The other questions presented relate to the regularity of the proceedings prior to the decree. We must hold that these questions were all foreclosed by the decree."

In *Peninsular Sav. Bank* v. *Ward*, 118 Mich. 87 (76 N. W. 161, 79 N. W. 911), in an action of ejectment, the precise objection to the decree and deed thereunder was made as is now made; and we there said, speaking through Justice HOOKER:

"But this question cannot be raised collaterally. The decree has determined the contrary. * * * The only way to reach such questions is in a direct proceeding, or possibly in equity, under proper circumstances."

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In *Cook* v. *Auditor General*, 124 Mich. 430 (83 N. W. 96), while it is true that it was not necessary to a decision of the case, yet this question was directly involved, and the same objection to the deed was made there that is made here, and we said that this and other reasons insisted upon for the *mandamus* "relate to matters that are foreclosed by the decree, and which could only be raised in a direct proceeding in the case." In *Kneeland* v. *Wood*, *supra*, we pointed out the two remedies provided by the statute.

The object of the statute, and of the chancery proceedings thereunder, would be largely nullified if the auditor general had the power to inquire into all the proceedings anterior to the decree, and determine whether they were sufficient to give the court jurisdiction. We do not think the statute confers any such jurisdiction. If the legislature had intended to confer this extraordinary power upon the auditor general, it would have been entirely unnecessary to specify the causes mentioned in subdivisions 1, 2, and 4. The general power of subdivision 3, as claimed by respondent, or a single general provision, would have covered the entire ground. To hold that the auditor general is clothed with power to set aside the deeds for the three reasons, numbered 1, 2, and 4, mentioned in section 98, and that subdivision 3 is limited to proceedings after decree, harmonizes the statute, and gives all its provisions a reasonable construction. The reason for conferring this authority to cancel deeds for causes existing before suit is stated above. Fatal defects existing after the sale are very properly placed within the power of the auditor general to correct. In so far as the case of *Gurd* v. *Auditor General* can be held to sustain the power of the auditor general to review and set aside proceedings prior to the decree, it is overruled.

The learned attorney general urges that after the decision in *Connecticut Mut. Life-Ins. Co.* v. *Wood*, rendered in December, 1897, the auditor general has exercised the power now claimed, and has canceled deeds in many in-

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stances where it appeared to him that they were invalid. The power of the auditor general was not even mentioned in that suit. It was a suit in chancery,—the proper forum for the determination of the questions involved. It gave the auditor general no right to believe that he possesses the same power to set aside these deeds as do courts in chancery. This practice of the auditor general for less than four years has not established a construction binding upon the courts.

The decree is affirmed.

The other Justices concurred.

HYDE *v.* CHADWICK.

MANDAMUS—GARNISHMENT—SUMMONS TO SHOW CAUSE.

Mandamus will lie to compel a justice to issue a summons to show cause in garnishment proceedings, if such summons is applied for within the time allowed by 1 Comp. Laws, § 997, although the plaintiff did not appear at the time of the disclosure, and the justice entered a judgment against him.

Certiorari to Gratiot; Stone, J. Submitted April 22, 1902. (Calendar No. 19,264.) Decided February 17, 1903.

Mandamus by Royal M. Hyde to compel Edwin N. Chadwick, justice of the peace, to issue a summons to show cause against a garnishee defendant. From an order denying the writ, relator brings *certiorari*. Reversed.

H. M. Dunham, for relator.

Bert Hayes, for respondent.

MOORE, J. January 17, 1902, the relator obtained a judgment before Edwin N. Chadwick, a justice of the

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peace, against Charles E. Trescott. On the 30th day of January he filed an affidavit for writ of garnishment, and a writ of garnishment was issued directed to the Alma Sugar Company, returnable February 6, 1902, at 10 o'clock in the forenoon. On the 5th of February the said garnishee defendant made a disclosure in writing by its secretary to the effect that it was not indebted to the said Trescott, he having assigned his wages, amounting to $23.63, to Bert Hayes on December 28, 1901, and that said garnishee defendant was not indebted to said Trescott, and did not have property, money, or effects of the principal defendant other than as above mentioned. On February 6th the disclosure of the garnishee defendant was filed. After waiting one hour after 10 o'clock, the relator not appearing before the justice, he entered a judgment in favor of the garnishee defendant and against the plaintiff. The garnishee defendant soon thereafter, and probably the next day, paid the $23.63 to Mr. Hayes. On the 11th of February the relator applied to the justice to issue a summons directed to the garnishee defendant to show cause why a judgment should not be rendered against it. The justice refused to issue said summons. An application was made to the circuit court for a writ of *mandamus* to compel him to do so. After a hearing, the circuit judge refused to issue the writ of *mandamus*. The relator seeks to review his action by a writ of *certiorari*.

The case calls for a construction of section 997, 1 Comp. Laws. The language of that section is not ambiguous. It reads:

"In cases of garnishee proceedings commenced after the rendition of a judgment against the defendant therein, within thirty days after the closing of the examination in such garnishee proceedings, the justice shall, at the request of the plaintiff, his agent or attorney, issue a summons against the garnishee, commanding him to appear before the justice to show cause why a judgment should not be rendered against him."

This is not a case like *Johnson* v. *Dexter*, 38 Mich. 695,

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where the plaintiff failed to appear upon the return day of a summons to show cause, but here the relator made application within the time provided by the statute for the summons to show cause, and we think he was entitled to it. The circuit judge should have made the order.

HOOKER, C. J., GRANT and MONTGOMERY, JJ., concurred.

BRAY *v.* FLETCHER.

1. STATUTE OF LIMITATIONS—BREACH OF WARRANTY.
   The statute of limitations against an action for a breach of warranty under a deed of lands in Wisconsin, given when certain taxes were a lien on the land, begins to run from the date of recording the tax deed, as, under the laws of that State, the recording of a tax deed gives the grantee constructive possession, and amounts to an eviction.

2. SAME—SUSPENSION OF STATUTE.
   The statute of limitations against an action for a breach of warranty is not suspended by reason of the grantor's authorizing the grantee to bring suit to clear the title, where the grantee settles such suit without the consent of the grantor.

Error to Wayne; Rohnert, J. Submitted December 2, 1902. (Docket No. 62.) Decided February 17, 1903.

James M. Bray and Leander Choate presented a claim against the estate of George N. Fletcher, deceased (represented by Frank W. Fletcher and Allan M. Fletcher, executors), for damages for the breach of the covenants in a deed. The claim was disallowed by the commissioners, and claimants appealed to the circuit court. From a judgment for defendants on verdict directed by the court, claimants bring error. Affirmed.

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De Forest Paine, for appellants.

Russel & Campbell (*Henry M. Campbell*, of counsel), for appellees.

CARPENTER, J. This is a claim for damages for the breach of covenants. On November 5, 1879, defendants' testator deeded to claimants an undivided 9-16 interest in 65 40's of pine land, situated in Wisconsin. This deed contained a covenant of seisin, covenant against incumbrances, and covenant of warranty. The controversy arises out of certain taxes levied on said lands for the years 1876 and 1877. At the time the deed was executed, these taxes had not ripened into a title, though the land had been sold for the nonpayment of the taxes, and this sale constituted an incumbrance on the lands. A tax deed of 19 of these 40's and other lands was issued to one Joseph H. Porter, September 9, 1881, and recorded September 12, 1881. Four tax deeds of 25 of these 40's and other lands were issued to one William H. Webster, bearing date, respectively, July 8, 1881, July 12, 1881, February 20, 1883, and September 17, 1885, and recorded, respectively, July 8, 1881, July 23, 1881, February 27, 1883, and September 17, 1885. All of these tax deeds are for an undivided three-fourths of the land described in the deed from defendants' testator, so far as they described said lands.

On the 13th of March, 1882, claimants commenced two ejectment suits, one against Porter, to recover the 19 40's in his tax deed covered by the Fletcher deed, and other lands, and another against Webster, to recover the 25 40's in his tax deeds covered by the Fletcher deed, and also other lands. On October 14, 1886, claimants settled their controversy with Porter. They paid him $1,436.89, and received a quitclaim deed of all the land described in his tax deed, and of other land. March 12, 1895, claimants settled with Webster, paying him $25,000, and received his quitclaim deed of all the lands described in his tax deeds, and of other lands. An interest in the tax titles acquired by Webster still remained outstanding. On

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May 24, 1886, he had sold and conveyed an undivided one-third of his three-fourths interest to one S. A. Coleman. October 15, 1896, one Julius B. Grunert, grantee of Coleman, commenced a suit against one Jesse Spaulding, grantee of claimants, to recover damages for timber cut from the land in said Fletcher deed, and from other lands. Claimants, having given a warranty deed to Spaulding, were bound to and did assume the defense of this suit. December 12, 1896, claimants served on Fletcher a writing notifying him of the suit, and asking him to assume its defense. To this writing no attention whatever was paid. This suit resulted in a judgment against claimants for $18,500. Under the laws of Wisconsin, the recording of a tax deed gives the grantees therein constructive possession of the land, and amounts to an eviction.

Defendants' testator, George N. Fletcher, died November 6, 1899. This claim was not presented until March 9, 1901. At this time the commissioners on claims had filed their report, and the claim in controversy was presented under an order reviving the commission. The trial court directed a verdict for defendants upon grounds which we are not called upon to consider, as, in our judgment, as hereinafter shown, plaintiffs' claim is barred by the statute of limitations.

It is apparent that the statute of limitations commenced to run as early as 1885, at least, and that plaintiffs' claim is therefore barred, unless, in some manner, the operation of the statute has been suspended. Claimants contend that "the promises and conduct of defendants' testator induced them to refrain from bringing action within the period fixed by the statute; and that he would be, if living, and his legal representatives are, estopped to set up the statute."

Let us examine the promises and conduct referred to. November 5, 1881, Mr. Fletcher wrote Bray & Choate the following letter:

"A letter from Messrs. Finch & Barber, giving me

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their opinion of the case, is at hand, and they ask what proportion of the expense I will pay, provided they go on with the case for you. I wish to say at once that I have no disposition to divide the expense with you. If there must be a suit, it is my business to pay it all, but, at the same time, I am not so overflush with funds that I do not care what the expense is. I wish you to engage these men at some fair figure to do the business for me, and I will pay them. See that their charges are fair. And I wish them to include all the lands granted me by the act."

The record does not show that any response was made to this letter, but it does show that claimant Choate showed the same to Messrs. Finch & Barber, and engaged them as attorneys in the ejectment suits which were commenced the 13th of the following March against Porter and Webster. Some correspondence took place between Messrs. Finch & Barber and Fletcher (which is not produced or proved), and the latter paid the former some money for their services in conducting these suits. On January 12, 1885, Finch & Barber wrote Fletcher about the tax litigation, inquiring if he was willing to settle certain suits, saying that another was begun to save the statute of limitations running, and stating:

"We would like to sort of weed out this litigation, and determine it in the principal cases where Bray & Choate are interested, and where the value of the lands is such that it will justify litigation. In the case of *Bray & Choate* v. *Porter*, it is our test suit. Have closed the testimony for the plaintiff, and at the next term of the Appleton circuit will probably get a decision."

September 9, 1886, Fletcher wrote Choate the following letter:

"It is strange that the State should go back on the contract, and then assume to sell the lands. I admit it is better to settle when it can be done finally, but there are too many cases, as I suppose, to admit of it. What does Palms propose to do? I should never have given a warranty deed only as to my own acts, but I did, and expect to suffer."

Notwithstanding this letter, claimants, on October 14,

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1886, settled with Porter, as already indicated. Shortly after this, Fletcher declined to make further payments to Finch & Barber towards the prosecution of these suits, and, after this, claimants paid them. We are able to say that this refusal of Fletcher occurred before February 11, 1887, as on that date claimants paid Finch & Barber $1,000 to be applied on their services. Respecting this, claimant Choate testified:

"Finch & Barber notified me at a certain time that we would have to stand liable for their fees, and something to the effect that they wouldn't go ahead unless we did. They didn't say that Mr. Fletcher refused to make these payments. They said they couldn't get the money from him when they sent for it, and therefore I had to make the payment in the Porter settlement at that time."

The record shows no communication between the parties from this time until June 2, 1893, when Fletcher wrote Finch & Barber (it is evident that this letter is a reply to a letter from Finch & Barber, and their letter is not produced), as follows:

"I had hoped that all these perplexing matters had all passed into oblivion. B. & C. must have made a big thing in their purchase, while I was the loser. The great increase on the lands and the worthless claims, against all justice, leads me to decline paying anything more."

June 27, 1893, Finch & Barber wrote Fletcher as follows:

"Your valued favor of June 21st received. * * * You are aware that we settled the most important part of it [the litigation], taking up the certificates and obtaining a quitclaim deed from one Joseph H. Porter and others. There is still, however, a suit pending in the name of Bray & Choate against W. H. Webster and others, in which the validity of your title is involved, and in consequence of several tax deeds that were taken out on account of the nonpayment of the taxes for 1877 and 1878. I submitted your letters to Messrs. Bray & Choate, but they seem to think that under the arrangement you made with them, and under your warranty, and under the letter you wrote to us, in which you directed us to clear up the title, you

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ought to co-operate with them in removing this cloud from the title. They say that this land has been tied up for a number of years on account of this litigation, that it has been exposed to fire, that fire has run through it, and that they are willing, with some loss to themselves, to do what is right so far as you are concerned. I have been in hopes that they would be able to make an amicable settlement themselves with the parties who hold these tax deeds. and have urged Mr. Choate to see you personally and explain to you in detail just the condition of this litigation. * * * Mr. Bray, a member of the firm of Bray & Choate, is in poor health, and for that reason I think Mr. Choate would like to get the matter off his hands. I have told him repeatedly that I had no authority to make any arrangements for you, that I was simply your attorney in this matter, and that you felt that your title was good, and that if the litigation was pressed to a final termination we would be successful. The great trouble is that there are so many points involved, and that the litigation is so expensive on account of the different questions that arise, that we have not forced the cases to a trial as we would have done, hoping that Bray & Choate would effect a settlement themselves with these parties. We have protected you by bringing these suits and keeping them alive, in order that no question of the statute of limitations might be involved. It is our advice that you either force this litigation, or that you endeavor to make some arrangement with Mr. Choate whereby you will in the future be relieved from all possible liability in respect to the same."

(It is probable that this is in reply to the letter of June 2d, therein referred to as June 21st, though Mr. Barber thinks the letter is in reply to one from Fletcher asking for information about the suit.)

July 20, 1893, Mr. Fletcher wrote Finch & Barber as follows:

"I have written B. & Choate, and when I hear will write you again. In Nov., '81, you wrote you had closed the Palms and my suits, beating the Oconto claimers; and, under this as a precedent, why not close these? Palms and I were contractors, but were subcontractors. Did you attempt to set the deeds aside from defects in taxing by terms outside of the lands? Could not the State be made

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to father these suits and costs, for unfair taxing lands exempt? As I read, the law says when a deed has been given and recorded nine months, and the lands were subject to taxation, then it was barred. Are these lands subject to taxation? If Taylor gained his case in U. S. courts, could we not, for same reasons? This suit was commenced in Choate's name. Why not press it for a close, and have it for C. and I to arrange after?"

No reply is shown to have been made to this letter. Claimant Choate testified:

"I don't think I have any other correspondence from Mr. Fletcher on the question in controversy in this claim, other than the letters I have presented. I think there was a letter previous to that that I handed to the attorney. It don't seem to be found. I might have received a letter from Mr. Fletcher from November 5, 1881, to September 9, 1886, upon this question. I think there was one letter came before the date of any of these. I think there has been some since September 9, 1886, but that is all that I could find."

Does the testimony warrant claimants' contention that they were induced to refrain from bringing the action within the period fixed by the statute? It is to be observed that this testimony is most unsatisfactory. The entire correspondence is not produced. Fletcher's letter of June 21, 1893, which was shown to claimants (if it was not, as we suspect, the letter of June 2, 1893), is not produced; and it is a very important letter, because it indicated his position respecting the pending litigation. Nor is Fletcher's letter written to claimants, which presumably indicated his position respecting the pending litigation, referred to in his letter of July 20, 1893, produced. Nor is the letter of Finch & Barber, which drew out Fletcher's letter of June 2, 1893, produced. We think no inference can be drawn from this testimony which warrants claimants' contention. They contend that, as Mr. Fletcher promised to pay the expense of litigation to test the tax titles, he could not, while that litigation was pending, claim the benefit of the statute of limitations. It may be doubted if Mr. Fletcher authorized the suits actually commenced and car-

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ried on by claimants. Mr. Fletcher's letter of November 5, 1881, authorized claimants to institute suits to test the tax titles on the lands sold by him to claimants, and on other lands of his. The suits commenced omitted all other lands of his, and included other lands of claimants.

But assuming, without deciding, that the suits commenced were authorized by Mr. Fletcher, claimants, in settling the suit against Porter in 1886, put an end to the agreement. It should be stated that Mr. Fletcher obtained his title to the land conveyed to claimants by a patent from the State of Wisconsin in 1871, which not only conveyed the land in question, but also other land. At this time an act of the legislature of Wisconsin exempted the land from taxation. It was Mr. Fletcher's claim that, by virtue of this act, the land was not subject to taxation in 1876 or 1877. The correspondence shows Mr. Fletcher's wish to "include in the suit all the lands granted him by the act" (patent); and that the Porter suit, as shown by the letter from Finch & Barber of January 12, 1885, was a test suit, in which Fletcher, as the owner of other lands, had a special interest. Mr. Fletcher, as shown by his letter of September 9, 1886, was opposed to the settlement of the Porter suit. Yet notwithstanding Mr. Fletcher's interests, and in opposition to his request, claimants settled the Porter suit. This was a breach of the contract by which Mr. Fletcher had agreed to pay the expense of prosecuting these suits. Had a suit been brought at once by the claimants against Mr. Fletcher, he might have been liable because of the covenants in his deed, but he would not have been liable upon the agreement under consideration. The claimants' failure to prosecute the suits as agreed would have afforded a complete defense. Is it possible that the claimants, having thus broken the contract upon which they rely, can now take advantage of that contract to prevent the running of the statute of limitations? This question admits of but one answer. They cannot, unless the subsequent conduct of Mr. Fletcher indicates that he proposed, notwithstanding this breach of

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the agreement, to abide by it. It may be demonstrated from this record that his subsequent conduct is inconsistent with an intent to abide by this agreement, and is consistent only with an intention to disregard it. After this date he refused to make any further payments towards the expense of this litigation. But it is claimed the correspondence in 1893 indicates an intention to abide by the original agreement. This intention is certainly not found in the first letter written in that year, namely, the letter of June 2, 1893, for in that letter he declines paying anything more. It cannot be found in his letter of June 21st (a letter not produced, and which may be identical with that of June 2d). We can infer the contents of that letter from the following statement in Finch & Barber's letter of June 27th:

"I submitted your letter to Messrs. Bray & Choate, but they seem to think that under the arrangement you made with them, and under your warranty, and under the letter you wrote to us, in which you directed us to clear up the title, you ought to co-operate with them in removing this cloud from the title. They say that this land has been tied up for a number of years on account of this litigation, that it has been exposed to fire, that fire has run through it, and that they are willing, with some loss to themselves, to do what is right so far as you are concerned."

Two things are obvious: *First*, Bray & Choate insist upon more than Mr. Fletcher offered in his letter of June 21st; and, *second*, even they do not insist upon his carrying out the original agreement, but are willing to stand part of the loss themselves. The missing letter of June 21st (if it is missing) certainly did not indicate an intent to carry out the original agreement.

Great reliance is also placed upon Mr. Fletcher's letter of July 20th, which concludes as follows: "This suit was commenced in Choate's name. Why not press it for a close, and have it for Choate and I to arrange after?" Does this mean that, when the suit is ended, Fletcher will settle with Bray & Choate according to their legal rights, or that he will pay the expense of the pending litigation?

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Clearly not. The language is a mere inquiry. The letter abounds in inquiries, to all of which, including the one under consideration, an answer is desired. Even if this language amounted to a proposition, it cannot be taken as granting more than claimants had demanded; viz., an agreement that Fletcher should bear a part of the loss. But whether this was an inquiry or a proposition, it was never accepted or acted upon; for the suit then pending, —the Webster suit,—instead of being pressed to a close, was settled without any consultation with Mr. Fletcher.

We conclude, therefore, that nothing transpired, after the breach of the contract by the claimants in 1886, from which an inference can be drawn that Mr. Fletcher chose to abide by such contract, and that the claim asserted in this suit is, therefore, barred by the statute of limitations.

The judgment of the court below is affirmed.

The other Justices concurred.

132	281
e134	s369
e134	s370
132	281
135	s283
132	281
e138	s244
132	281
156	s701

KYES v. VALLEY TELEPHONE CO.

1. PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—TELEPHONE COMPANIES.
   While a telephone company was removing a pole from the street, it fell upon the foreman of a street-paving work, who was 35 feet from where the pole stood. *Held*, in an action against the telephone company for the injury, that the fact that the foreman knew that the telephone wires were being cut and removed was not sufficient notice that the pole would fall.

2. SAME—QUESTION FOR JURY.
   Where there was conflicting testimony as to whether plaintiff's intestate was warned as to the danger, the question of contributory negligence was properly left to the jury.

3. SAME—SURVIVAL ACT—DAMAGES.
   An administrator, in an action to recover for personal injuries

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resulting in the death of his intestate, is entitled to recover, under the "Survival Act" (3 Comp. Laws, § 10117), for what the deceased might have earned during the time he probably would have lived had he not been injured.

Error to Saginaw; Snow, J. Submitted December 5, 1902. (Docket No. 117.) Decided February 17, 1903.

Case by Nora Isabella Kyes, administratrix of the estate of Roderick Kyes, deceased, against the Valley Telephone Company, for alleged negligent injuries to her intestate. From a judgment for plaintiff, defendant brings error. Affirmed.

The deceased, Roderick Kyes, was a general foreman on the work of paving Saginaw street, in the city of Flint. The defendant had been notified to remove its telephone poles from the street, and was engaged at that work. The wires had been removed. The guy wire was cut from the pole, which fell, and struck and injured the decedent. He was at the time engaged in filling a sewer trench. The pole fell upon him, and inflicted injuries from which he died the following day. The injury occurred at 9 o'clock in the morning. He remained unconscious until about 1 o'clock, then regained consciousness, and retained it until the following day, about 2 o'clock, when he became unconscious, and remained so until his death. He was 39 years of age, in good health, and intelligent. He received $2.50 per day. He left a wife and two children, and a third child was born after his death. The negligence charged is the failure to exercise due care and caution in taking down the telephone pole. Plaintiff recovered a verdict for $5,000.

Weadock & Purcell, for appellant.

L. T. Durand (*Durand & Carton*, of counsel), for appellee.

GRANT, J. (*after stating the facts*). 1. The defend-

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ant does not contend that there was no evidence of negligence on the part of the defendant, but upon the trial insisted and requested the court to instruct the jury that the deceased was guilty of contributory negligence. It is insisted that he continued to work in this dangerous position with full knowledge that the pole was liable to fall. We cannot concur in this view. It is unnecessary to state the testimony in detail. He was not warned by the defendant that there was any danger. The fact that he knew that the telephone wires were being cut and removed, and that some of them had fallen near where he was at work, was not sufficient notice to him that the pole would fall. He had a right to act upon the belief that, when the defendant's employés were ready to take down the pole, they would notify him, if there was any danger, or would adopt safe means to take it down. Two men who were walking along the street testified that they said in the presence of three men, including the deceased, who were working there, that they "wouldn't work there a minute;" that it was dangerous. One of the workmen positively denied any such conversation. Besides, the deceased was at work in the trench, from 30 to 35 feet distant, and perhaps paying no attention to the conversation. One may be in position to hear, but it does not follow that he does hear or that he ought to hear. That depends upon how his mind and attention are occupied. The testimony on this point was in sharp conflict, and was properly left to the jury. *Menard* v. *Railroad Co.*, 150 Mass. 387 (23 N. E. 214); *Horn* v. *Railroad Co.*, 4 C. C. A. 346, 54 Fed. 301.

2. This action is brought under what is known as the "Survival Act" (section 10117, 3 Comp. Laws), which reads as follows:

"In addition to the actions which survive by the common law, the following shall also survive, that is to say: Actions of replevin and trover, actions of assault and battery, false imprisonment, for goods taken and carried away, for negligent injury to persons, for damage done to

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real and personal estate, and actions to recover real estate where persons have been induced to part with the same through fraudulent representations and deceit."

The court instructed the jury that:

"The plaintiff is entitled to recover the same damages that the deceased would have been entitled to recover had he brought the action in his lifetime. That is to say, you may award such damages as, in your judgment, would be a fair compensation for the loss sustained by the deceased by reason of the injuries he received. You are to consider his age, his habits of industry, his ability to labor, his capacity to earn money, and the wages he was in the habit of earning when injured, and the length of time he would probably have lived had he not been injured, the loss he sustained by reason of being deprived by such injuries of the ability to labor and earn money during the time he probably would have lived had he not been injured,—using your best judgment, under all the facts and circumstances in the case, in arriving at what would be a just compensation for such loss."

In *Sweetland* v. *Railway Co.*, 117 Mich. 329 (75 N. W. 1066, 43 L. R. A. 568), it was decided that the statutes do not give two rights of action. The statutes were again before the court in *Dolson* v. *Railway Co.*, 128 Mich. 444 (87 N. W. 629), and we again so decided, and held that, where death is not instantaneous, the administrator recovers under the survival act, and that, where the death is instantaneous, the recovery, if any, must be under the death act (sections 10427, 10428, 3 Comp. Laws). Defendant now insists that plaintiff's measure of damages, in addition to compensation for pain, suffering, and medical attendance, is what the deceased might have earned between the time of his injury and his death. We said in the *Dolson Case* that the administrator could recover "the full measure of damages for the benefit of the next of kin." When an action survives, the representatives of the deceased are entitled to recover the same measure of damages that he could have recovered if he had lived to bring his suit to a successful issue. *Muldowney* v. *Railway Co.*, 36 Iowa, 462; *Maher* v. *Traction Co.*, 181 Pa.

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St. 391 (37 Atl. 571); 8 Am. & Eng. Enc. Law (2d Ed.), 908, par. 11. The instruction was correct.

We find no prejudicial error in the rulings of the court upon the testimony.

The judgment is affirmed.

The other Justices concurred.

M. C. BULLOCK MANUFACTURING CO. *v.* SUNDAY LAKE IRON MINING CO.[1]

1. REPEAL OF STATUTES—CORPORATIONS—LIENS.
   Section 5472, 2 Comp. Laws, is not repealed by section 44 of Act No. 113, Pub. Acts 1877.
2. SAME—TITLE OF ACT.
   The title to an act (Act No. 113, Pub. Acts 1877), limiting it to the revision of the laws providing for the incorporation of certain companies, does not authorize the repeal of a section of an act (2 Comp. Laws, § 5472) authorizing corporations of other States to engage in business in this State.
3. SAME—CONSTRUCTION OF STATUTE.
   A clause in an act relating exclusively to domestic corporations, purporting to repeal, "so far as they relate to" such corporations, certain specified acts, among them one referring solely to foreign corporations, cannot be said to effect a repeal of the last-mentioned act.
4. LIENS—PURCHASE OF PROPERTY—MERGER.
   Where one of the holders of two concurrent liens purchases the property subject to the liens, his own lien is not merged in the title thus purchased.
5. SAME—ACCOUNTING.
   Where a judgment creditor, who is also the holder of a lien on the debtor's property, causes a portion of the property, upon which there is a concurrent lien, to be sold on execution, and applies the proceeds upon the judgment, upon an accounting between the lienholders the proceeds of such sale should be deducted from his *pro rata* share under the lien.

[1] Rehearing denied May 29, 1903.

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Appeal from Gogebic; Haire, J. Submitted December 3, 1902. (Docket No. 138.) Decided February 17, 1903.

Bill by the M. C. Bullock Manufacturing Company against the Sunday Lake Iron Mining Company, James Corrigan, Stevenson Burke, and Price McKinney to determine the priority of certain liens. From a decree for defendants, complainant appeals. Reversed.

Ball & Ball, for complainant.

C. E. Miller (*A. L. Flewelling*, of counsel), for defendants.

MONTGOMERY, J. In 1893 the Sunday Lake & Gogebic Company, a corporation organized and existing under the laws of the State of Wisconsin, became indebted to complainant in the sum of $9,784.36 for the purchase price of a hoisting plant and its appurtenances furnished to the company by complainant. This hoisting plant was erected on land in the county of Gogebic of which the mining company was a lessee. At the same time the company was indebted for labor to sundry parties in an amount aggregating some $26,419.67, which was represented by drafts indorsed to and which were apparently the property of Price McKinney. Numerous levies had been made upon the property of the corporation. On the 3d day of August, 1893, the complainant filed a bill in the circuit court of Gogebic county, in chancery, to have a lien declared in its favor, and for the enforcement of such lien. The corporation and attaching creditors were made parties. Decree was entered on the 8th of March, 1894, declaring a lien in favor of complainant in the sum of $10,278.86, besides costs of $285.30. This lien, by the decree, attached to the hoisting plant and to the title and interest of the mining company in the land of which it was lessee. After the decree was entered, there was intervention by injunction to prevent the execution of the same by the defendant Price McKinney, and it was agreed that no

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steps should be taken to enforce the same without notice to McKinney's attorney, and no steps were in fact taken for a considerable period.

On the 15th of August, 1893, suit had been commenced against the mining company by Corrigan, Ives, and Burke, and on the 4th of November a judgment was rendered in their favor in a sum for more than $190,000. On the 15th of February, 1894, a sale of the land and personal property belonging to the mining company was made, and Price McKinney became the purchaser. This sale was made in different parcels: *First*, $8,000 was paid for the personal property, consisting of two stockpiles of ore and other personal property. The ore piles were sold to Price McKinney, subject to the lien of Price McKinney for royalty and labor claims, and the other personal property was sold subject to the lien of complainant, and a lien claimed by Price McKinney for labor. The proceeds of this sale, the $8,000, were paid to Price McKinney in part, as assignee of judgments secured against the company. On the same day that the sale was had, an action was brought by Price McKinney to recover on the labor claims held by him, which proceeded to judgment on the 25th of May, 1894, when a recovery for the amount of the labor claims was had, and it was adjudged that McKinney had a lien upon all the real and personal property of the defendant in the Upper Peninsula for said sum.

The present bill is filed setting forth these facts, and, in addition, alleging that the leasehold interest of which Price McKinney became the purchaser became the property of Corrigan, McKinney, and Burke, through the agency of the Sunday Lake Iron Mining Company, of which they held substantially all the stock, and that they thereafter caused the Sunday Lake Iron Mining Company to relinquish its lease, thereby depriving the complainant of all the property upon which it could enforce its lien, with the exception of the hoisting plant; that the hoisting plant is still in possession of the Sunday Lake Iron Mining Company, the new corporation created by the defendants.

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The circuit judge decreed that the complainant had a lien under the statute providing for a mechanic's lien, that the defendant Price McKinney acquired by his judgment a lien under section 10755 of the Compiled Laws of 1897, and that this lien had priority over that of complainant, and decreed that, before complainant could proceed to enforce its lien, it should pay or tender to defendant the amount of this prior lien. Complainant appeals.

The contention of complainant is that it is entitled to a lien under section 5472 of the Compiled Laws, which provides that "Every person who shall perform any labor or furnish any material for such corporation * * * shall have a first lien for the amount due thereon, * * * which lien shall take precedence of all debts, judgments or decrees, liens or mortgages against such corporation, except liens accruing to this State for taxes, fines, or penalties," and that this lien is concurrent with the lien of defendant Price McKinney, acquired under section 10755, 3 Comp. Laws, which lien, it is conceded, is substantially of the same character. The circuit judge held, in accordance with defendants' contention, that section 5472 of the Compiled Laws had, as it affects the corporation in question, been repealed, and this presents the first question for our consideration.

The statute which it is claimed repeals section 5472 is Act No. 113 of the Public Acts of 1877. This act is entitled:

"An act to revise the laws providing for the incorporation of companies for mining, smelting, and manufacturing iron, copper, silver, mineral coal, and other ores or minerals, and to fix the duties and liabilities of such corporations."

The act proceeds to provide for the incorporation of domestic corporations, and section 44 is the repealing section. This section begins as follows: "The following entitled acts, so far as they relate to corporations authorized by this act, are hereby repealed." This is followed by an enumeration of a large number of acts, including

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specifically an act to authorize corporations of other States to engage in the mining and smelting of ores or minerals in this State, of which section 5472 is a part. We think it cannot be said that the act of 1877 repeals section 5472. In the first place, the repeal of that section is not within the title of that act. The title limits the purpose of the act to the revision of the laws providing for the incorporation of companies, and does not relate to the authority given by statute to corporations of other States to engage in mining in this State. More than this, the language of the repeal is limited to the acts enumerated so far as they relate to corporations authorized by the repealing act. Foreign corporations were not authorized by the repealing act, and we think it must be held that the intent of the legislature is too obscure to justify an inference of a direct repeal. It follows from this that the liens of complainant and defendant Price McKinney were concurrent or simultaneous liens.

It is next contended by complainant that the effect of the purchase of this property by Price McKinney, subject to the liens of himself and complainant, was to merge the McKinney lien in the title thus purchased. It is conceded by complainant that the equity rule would, if there had been an intervening equity in favor of defendant and between complainant and the title acquired, prevent a merger. We think the rule should be the same where there is a remedy concurrent with complainant's, and where it is evidently for the benefit of the defendant that no merger be presumed. See 2 Pom. Eq. Jur. § 798.

What, then, are the rights of the parties? It is manifest that the decree below, as it proceeded upon the theory that the defendant's lien was a prior one, cannot be sustained. The proper decree should be based upon the theory that these liens were concurrent, and we think it will be necessary to remand the case for the purpose of ascertaining more definitely the rights of the parties. A sale of the property covered by these liens will be ordered, and the amount realized should be applied upon the respec-

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tive liens represented by the judgment of Price McKinney and the decree of complainant. But as it appears that, out of the proceeds of the sale of the personal property, Price McKinney, as the alleged assignee of judgments recovered against the company, received $3,952.75, which he applied upon such judgments, and which sum should have been applied upon his prior lien for labor claims, this amount should be deducted from the *pro rata* share coming to him upon the accounting. Upon such accounting it should also be ascertained and determined whether anything of value passed to Price McKinney's assignees upon the surrender of the leasehold interest. Should it be ascertained that they did receive any sum upon such surrender, then, as the two liens of complainant and McKinney should first have been satisfied out of the proceeds of such surrender, the amount so received will be charged against the defendant in the accounting. The complainant will recover costs of both courts.

The other Justices concurred.

BARTLE *v.* HOUGHTON COUNTY STREET-RAILWAY CO.

1. NEW TRIAL—WEIGHT OF EVIDENCE.

   The decision of the trial court in denying a motion for a new trial, based on the ground that the verdict was against the weight of the evidence, will not be reversed, where the only question was whether a street car was in motion at the time plaintiff attempted to alight, and her testimony that it was not in motion was corroborated by other evidence, although the conductor and six passengers testified that it was in rapid motion.

2. STREET RAILWAYS—NEGLIGENCE—EVIDENCE.

   Testimony by plaintiff that, while she was holding to the rail of a street car with her left hand, with her foot out to step on the ground, she heard the bell ring, became insensible,

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and, on regaining consciousness, found her left arm pulled out of its socket, warrants the jury in finding that the car started as she was alighting.

Error to Houghton; Streeter, J. Submitted January 7, 1903. (Docket No. 9.) Decided February 17, 1903.

Case by Mary Bartle against the Houghton County Street-Railway Company for personal injuries. There was a judgment for plaintiff, and, a motion for a new trial having been denied, defendant brings error. Affirmed.

Gray, Haire & Rice, for appellant.

J. F. Hambitzer, for appellee.

CARPENTER, J. The jury in the trial court, by their verdict, found that plaintiff was injured while a passenger on defendant's street car, because said car was negligently started as she was alighting therefrom. After the verdict, defendant moved for a new trial, on the ground that the verdict was not supported by the evidence, and was against the clear weight and preponderance of the evidence. The court below denied this motion, and the only questions raised by this appeal relate to the correctness of that decision.

It is conceded that plaintiff, while a passenger on defendant's street car, was injured in attempting to alight from said car. The only question disputed by the testimony is whether or not the car was in motion when this attempt to alight was made. Plaintiff testified that the car was not in motion; that she followed three ladies who got off the car.

"When the last lady left the first step, I got right there, so I could go down, so as not to step on her skirts, and when they left the bottom step I got onto the bottom step. I was standing on my left foot. I put this foot out, for to step off onto the ground, and I heard the bell ring. I was holding on to the rail with my left hand. * * * I put my foot out over, and I was injured. Of course, I was

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insensible after I heard the bell ring. That is all I remember. * * * My left arm was pulled out of its socket."

Mrs. Lydia Reynolds, who was a passenger on the car, testified:

"I heard the bell ring very quickly after Mrs. Bartle went out, and I wondered if those ladies had time to get off. * * * I did not leave the car when I heard there was a woman injured. The car had just stopped when I saw Mrs. Bartle come down the aisle, and I saw those three ladies coming down the aisle, and Mrs. Bartle behind."

Defendant introduced the testimony of the conductor of the car and six passengers, who testified that the car was in rapid motion at the time plaintiff attempted to alight. One of these witnesses, however, was accustomed to ride on passes given by defendant; and the plaintiff's son testified that he asked the conductor, the next day after his mother's injury, "how he came to start the car before mother got off, and he said he thought she was off." Plaintiff's husband, too, gave testimony tending to contradict the testimony of defendant's witnesses that the car was not stopped at the place where plaintiff was injured. Under these circumstances, we cannot say that the trial judge was not justified in deciding that the verdict was not against the clear weight and preponderance of the evidence.

Defendant also insists that the evidence did not warrant the submission of the case to the jury, on the ground that plaintiff's testimony does not warrant the inference that she was injured by reason of the car starting as she was alighting therefrom. It is to be noted that, though the defendant filed its original brief in this court on the 1st of August, 1902, and its reply brief on the 29th of August, this claim is first made in a supplemental brief filed on the 7th of November. Defendant explains its neglect to make this point earlier by saying, "The feature of the law now to be suggested did not occur to us before." It is unnecessary to dispose of this contention by saying that it will

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not be considered because not made earlier. We think that plaintiff's testimony, heretofore quoted, that, while she was holding to the rail with her left hand, with her foot out to step on the ground, she heard the bell ring, became insensible, and, when she regained consciousness, found her left arm pulled out of its socket, clearly warranted the jury in inferring that the car, the rail of which was in her left hand, started as she was alighting. This is not like the case of *Benedick* v. *Potts*, 88 Md. 52 (40 Atl. 1067, 41 L. R. A. 478), cited in defendant's brief, where it was held that the jury could not be permitted to infer negligence from the mere fact of the injury. It is a case, however, in which negligence may be inferred from the injury and from the accompanying circumstances. *La Fernier* v. *Soo River Lighter & Wrecking Co.*, 129 Mich. 596 (89 N. W. 353).

The case of *Paynter* v. *Traction Co.*, 67 N. J. Law, 619 (52 Atl. 367), is confidently relied upon by defendant in support of the proposition under discussion. There the plaintiff testified that she was attempting to alight from a car after it stopped, and while she was in the act of alighting she was thrown to the ground. The witnesses introduced by her, who were passengers, and in a position to make accurate observation, had no recollection of the car starting again until after plaintiff's injury; and the court, upon the principle that "the mere happening of the accident is not sufficient to place legal responsibility for its effects upon the defendant," decided that the jury could not, from this evidence, infer that the injury was caused by the starting of the car. That case is clearly distinguishable from the case at bar. There it was more probable that some other cause than the starting of the car had occasioned plaintiff's injury. Here it is difficult to see how any other cause than the starting of the car could have occasioned plaintiff's injury in the manner and under the circumstances stated by her.

The judgment of the court below is affirmed.

The other Justices concurred.

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CORNELISSEN *v.* ORT.

1. EVIDENCE—ADMISSIONS—AFFIDAVITS.
   The affidavit of a party to a suit, and that of his solicitor, made at his request, and filed in the cause, may be used as an admission against the party in another suit.

2. ATTORNEY AND CLIENT—NEGLIGENCE—EVIDENCE.
   Plaintiff brought an action against three attorneys for negligence in not perfecting an appeal in a chancery suit. On a motion to extend the time for taking the appeal, he filed an affidavit by himself, as well as one by his solicitor, showing that he relied upon the solicitor to perfect the appeal, and not upon the two who were employed as counsel. *Held*, that a verdict of not guilty in favor of the two who were employed as counsel was justified by the evidence.

3. SAME—DAMAGES.
   In an action against an attorney for negligence in not perfecting an appeal in a chancery suit, evidence of the amount involved in the suit and the costs paid by reason of the decree does not overcome the presumption of the validity of the decree, and, without further proof being offered, is inadmissible.

4. SAME—BURDEN OF PROOF.
   Whether, in an action against an attorney for negligence, after negligence has been shown, it is incumbent upon him to show that the client has not been injured by reason of the negligence,—*quære*.

Error to Kent; Wolcott, J. Submitted January 8, 1903. (Docket No. 16.) Decided February 17, 1903.

Case by Felix Cornelissen and Philomena Cornelissen against Felix J. Ort, and also Reuben Hatch and Hugh E. Wilson, copartners as Hatch & Wilson, for damages for failure to perfect an appeal. From a judgment for plaintiffs against defendant Ort only, plaintiffs bring error. Affirmed.

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McCormick & La Grou, for appellants.

Fred M. Raymond (*Charles M. Wilson*, of counsel), for appellees Hatch & Wilson.

MOORE, J. This is an action against attorneys for negligence in allowing the time in which an appeal could be taken from a court of record to the Supreme Court to expire, so that the case tried in the court below could not be reviewed. The case was tried by a jury, who returned a verdict in favor of defendants Hatch & Wilson, and one against the defendant Ort for $85. A motion was made for a new trial, which motion was overruled. The plaintiffs have brought the case here by writ of error. Defendant Ort has not presented a brief in the case.

It was the claim of plaintiffs that defendants were all employed generally to remove the case to the Supreme Court, and that all were negligent in not doing so. It was the claim of defendants Hatch & Wilson that the solicitor of record was defendant Ort; that Hatch & Wilson were employed as counsel simply, and Ort was to look after getting the proper extension of time in which to take an appeal, and the negligence of which complaint is made was the negligence of Ort. Upon that question the trial judge instructed the jury as follows:

"I instruct you, as a rule of law in that regard, that if the plaintiff employed these three attorneys generally to take the case to the Supreme Court, and it was understood between them that they were all charged with the responsibility and duty of doing whatever was necessary in that regard, then each of them would be liable for any neglect of duty to the plaintiff's damage.

"If, on the other hand, the plaintiff relied on Mr. Ort as his solicitor having charge of the case, relied on Hatch & Wilson as counsel only, having charge of a certain portion of the work in the case, but it was understood that Mr. Ort was intrusted with procuring such extensions of time as were necessary, and Hatch & Wilson used reasonable care and diligence in the portion of the work intrusted to them, without any negligence on their part, then they would not be liable in this action, but the defendant Ort would be liable.

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"If, on the other hand, it was the understanding of the plaintiff that he had engaged the services of Hatch & Wilson, and that was so understood by them, charging them with the duty and responsibility of taking whatever steps were necessary to save his rights of appeal, and to perfect his appeal and get it in the Supreme Court, and they failed to do it, they would be liable. If that was the understanding between the plaintiff and these parties, and Hatch & Wilson were to be held responsible for doing this work, it would not be an excuse for them that they intrusted it to Mr. Ort, and that he failed to do it, unless, as I say, it was the understanding in the beginning, on the part of the plaintiff, that Mr. Ort was the principal attorney having charge of the case, and that Hatch & Wilson were counsel only. These facts you must determine from the evidence.

"If you find, as I have said, the duty and responsibility with a fair understanding between the plaintiff and these counsel that they were each and all charged with the responsibility of taking the necessary steps, and that there was a failure in that regard,—negligence on their part,—for which the plaintiff was not responsible, resulting in the loss of the right to take his case to the Supreme Court, then they would all be liable."

It is claimed the admitted facts in the case conclusively show the liability of Hatch & Wilson, that their employment was general, and not special, and that the verdict of acquittal as to them is wholly unwarranted.

The record shows that in July, 1896, the plaintiffs filed a bill of complaint in the chancery side of the court, Mr. Ort appearing as solicitor for complainants. It was not until 1898 that Hatch & Wilson were employed to assist Mr. Ort. It is their claim they were employed as counsel. The case was heard in July, 1898. The circuit judge rendered a decree against complainants. After the time had expired to remove the case to the Supreme Court, the complainants employed Burlingame & Belden, attorneys, and they moved the court for an extension of time in which to perfect the appeal. This motion was based upon the affidavits of Cornelissen and Ort. The motion was overruled. Upon the trial of this case those affidavits

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were received as evidence. Complaint is made of their admission, because it is said Cornelissen, because of his unfamiliarity with the English language, did not understand what they contained. It is also said that, though they might be used as impeaching testimony, they cannot be used as affirmative evidence of the facts stated. These affidavits were prepared by Mr. Belden, a reputable attorney, in the presence of Mr. Cornelissen and Mr. Ort, and from facts which they stated to him preliminary to the drawing of the affidavits, and both of the affidavits were read to Ort and Cornelissen. Mr. Cornelissen swore to the one, and Mr. Ort to the other; Mr. Cornelissen knowing for what purpose they were to be used. In the affidavit made by Mr. Cornelissen he swore, among other things, as follows:

"Deponent further says that the bill of complaint herein was filed by F. J. Ort, Esq., as solicitor for complainants, and that, at the request of the said Ort, deponent procured a satisfactory appeal bond, which was duly filed in this cause; * * * that he was informed from time to time by said Ort that satisfactory progress was being made in the case, and, finally, that the case had been removed to the Supreme Court at Lansing; that he did not know until Sunday, the 29th of October, 1899, that said appeal had not been perfected. * * * Deponent further says that he was greatly surprised to thus learn for the first time of the condition of said case, because of having relied upon the said Ort to perfect said appeal and take such other steps as might be necessary."

The affidavit of Mr. Ort contains the following:

"F. J. Ort, of said county, being duly sworn, deposes and says that he is an attorney at law and solicitor in chancery, and that he filed the bill of complaint in said cause as solicitor for complainants, and that afterwards said complainants, at his request, retained Messrs. Hatch & Wilson as counsel, and that they performed the greater part of the work in preparing the cause for hearing; and deponent further says that he has read the affidavit of Felix Cornelissen, hereto attached, and that the same is true; and deponent further says that he was directed by his counsel, Hatch & Wilson, to extend the time for mak-

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ing and settling the case for review in the Supreme Court, and that he agreed so to do, and that he is informed that Messrs. Hatch & Wilson proceeded to and did prepare the greater part of the testimony taken in said cause for review by the Supreme Court, believing that said time had been extended for such work to be done. And deponent further says that through unfamiliarity of practice, and for other reasons, he neglected to have the time extended as aforesaid, and, when he discovered what the effect of said neglect was upon the complainants, he kept postponing the time of informing them of the consequences; that they are in no respect to blame for his failure to perfect said appeal, and that they ought not to be permitted to suffer by reason thereof.

"F. J. ORT."

It will be observed that Mr. Cornelissen swore he relied upon Ort to perfect the appeal. Ort swore he had read the affidavit of Cornelissen, and that it was true. There is not a suggestion in either affidavit that Cornelissen relied upon Hatch & Wilson to perfect the appeal. It must not be forgotten that one of these affidavits was made by a party to this record, and both of them were caused to be filed by him in a judicial proceeding. They were not only competent as impeaching evidence, but they were competent as admissions made by him. See *Reiser* v. *Portere*, 106 Mich. 102 (63 N. W. 1041); *Liesemer* v. *Burg*, 106 Mich. 124 (63 N. W. 999). We not only think there was evidence upon which to base the verdict of the jury, but we do not see how the verdict could well be different.

Error is assigned in relation to the rulings on the admission of testimony. We do not think it is necessary to discuss the assignments further than to say we do not think them well taken.

A more difficult question is one relating to the measure of damages. The tender of testimony in addition to what was received upon that branch of the case, and the ruling upon it, was as follows:

"*Plaintiffs' Counsel:* I would like the record to show that we offer to prove on the measure of damages the value of the property involved in that litigation (*Cornelis-*

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sen v. *Vanderveen*), being the property mentioned in the declaration; and also the items of costs and disbursements incurred by the complainant in that case; the value of the property offered being its value at the time of the decree.

"*The Court:* The court has intended to admit evidence tending to show costs and disbursements in and about the preparation of that case to take it to the Supreme Court, but up to this time he has not admitted any of the costs and disbursements of the original case in this court, nor the value of the property in litigation."

No offer was made to follow this by other testimony. It is the claim of plaintiffs that, when negligence has been shown on the part of a solicitor, it is then incumbent upon the solicitor to show the client has not been injured as the result of the negligence. It is the claim of the defendants that, while there are cases in support of the above rule, they are contrary to the great weight of authority. They claim a negligence case against an attorney is not different from one against any other defendant. The true rule is said by them to be that the burden is upon plaintiffs not only to show negligence, but that plaintiffs have suffered damage by reason thereof. The authorities are not in harmony upon this question, but we do not deem it necessary to decide between them. It was made to appear that a trial was had in the court below upon the merits, and a decree rendered against the plaintiffs. *Prima facie* this decree was right. *Turnbull* v. *Richardson*, 69 Mich. 400 (37 N. W. 499). The presumption of its validity would not have been overcome by showing the amount involved in the case, or the amount of costs paid by reason of that decree. With the proof admitted, the jury would not have been authorized to disregard the decree of the court below, and assume it was wrong, and would be overruled by the appellate court.

Judgment is affirmed.

The other Justices concurred.

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CORNELL *v.* WHITNEY.

DEEDS — CONSIDERATION — SUPPORT — BREACH OF CONDITION — TRUSTS.

Complainant conveyed his homestead to defendant in consideration that he should be furnished "a comfortable house to live in, good board and lodging, clothing, and all necessaries of life." After living with defendant for a year and a half, he left without cause, and defendant published a notice forbidding any one to trust or harbor him on his account. On a bill by complainant to set aside the deed, it was *held* that a decree should be entered compelling defendant to pay for complainant's maintenance since the publication of the notice and until complainant should choose to return, declaring the conveyance a trust to secure the performance of defendant's obligations, and, upon failure to perform such obligations, the property should revert to complainant.

Appeal from Wexford; Chittenden, J. Submitted January 7, 1903. (Docket No. 14.) Decided February 17, 1903.

Bill by John Cornell against Frank Whitney and Mary E. Whitney to set aside a deed. From a decree for complainant, defendants appeal. Modified.

Parm C. Gilbert, for complainant.

Patchin & Crotser, for defendants.

CARPENTER, J. Complainant obtained a decree in the court below setting aside a conveyance of his homestead to the first-named defendant, Frank Whitney, who is the husband of the other defendant, Mary E. Whitney. In consideration of this conveyance and the transfer of complainant's personal property, defendant Frank Whitney agreed in writing to furnish complainant "a comfortable house to live in, good board and lodging, clothing, and all necessaries of life; in case of sickness, with proper medical

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aid and attendance; and at death give his remains a respectful burial." The decree was rendered on the ground that the defendants had violated this agreement. Defendants claim that the testimony did not establish such a violation of the agreement as to warrant the decree, and this claim presents the only question this court is called upon to consider.

The conveyance in question was made on the 5th day of September, 1899, when complainant was more than 80 years old, but in full possession of his faculties. At this time defendants were living in Traverse City. They immediately removed to the property in question, and complainant resided there with them, as an inmate of their family, until May, 1901. During this period the evidence clearly proves that defendants faithfully performed every obligation of the contract above quoted, except this: They did not furnish complainant with clothing. It clearly appears, however, that complainant provided himself with clothing from means of his own, under an arrangement by which this outlay should be reimbursed from the proceeds of a sale of a part of the personal property transferred by him to the first-named defendant.

Complainant left his home with defendants because of a difficulty which deserves special mention. Early in May, 1901, a daughter of defendants eloped with an insurance agent. Shortly after this occurrence a sister-in-law and a niece of complainant called at defendants' house, and in a conversation with the niece complainant said, referring to the daughter who had eloped:

"They have always brought the girl up in laziness and idleness, and she didn't amount to much anyway. The first time I am up to your house, I am going to tell you something."

Thereupon defendant Mrs. Whitney came from the next room, and said:

"If you have anything to say, say it to me. Don't go to the neighbors and say it or tell it."

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Complainant testifies that Mrs. Whitney also uttered a vile slander concerning one of his daughters, but this testimony we do not credit, as it is contradicted not only by Mrs. Whitney, but also by complainant's niece. The following morning complainant left defendants' house, and took up his abode with one of his children. Shortly thereafter the first-named defendant published in the Sherman Pioneer, a newspaper in circulation in the community where the parties resided, this notice:

"*To Whom It May Concern:* That John Cornell has left his bed and board without any just cause or provocation, and I forbid any one trusting him or harboring him on my account, for I will not pay any bills after this date.
"FRANK WHITNEY."

It also appears that defendants have since that time furnished complainant with no clothing or other necessaries, and have made no effort whatever to induce complainant to return to their home. It should be noted, too, that this finding of facts is not materially different from that of the trial judge.

We agree with the trial judge that—

"Defendants' duty, undoubtedly, was to go to him [complainant], and try to induce him to come back home; to endeavor to reason him out of the notions he had got into his head, erroneously, perhaps. Instead of doing that, they do the very thing that would antagonize him and keep him away. They place a notice in the paper, wherein they say that they will not hereafter pay any of his bills, nor will they pay anything to any person who harbors him or trusts him. This, to a man of any spirit or mettle, would be the very thing that would drive him away and keep him away. This contract does not require that he shall live at that home. There is no special provision in the contract to that effect, although I think that that would be presumed in any case,—that he was to live there. But this does not prevent them or him from buying his own clothes, or their furnishing him with money to take care of and pay his little expenses."

Complainant testified that this notice was published and came to his attention some days before the trouble which

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occurred in May, while he was absent from home on a short visit to his daughter; and, in explanation of his contention that he left because Mrs. Whitney slandered his daughter, he testified that he was willing to continue his relations with defendants, notwithstanding said publication. Defendants urge that this testimony proves that this publication was not a serious grievance. There would be force in this contention if we credited the testimony, but we do not credit it. As already indicated, we find—and in making this finding we give full credit to defendants' testimony—that said publication did not occur until after the separation in May. We cannot credit complainant's explanation for taking a certain step, after we have found that he did not take it. Defendant Frank Whitney insists that he published this notice because he had reason to fear that complainant's relatives would seek to hold him responsible for complainant's board, and because both his physician and the township supervisor advised it. These circumstances mitigate, but do not excuse, his wrongful conduct. No advice could justify the repudiation of defendants' contractual obligation to provide complainant with clothing and proper spending money, whether he lived with them or elsewhere; nor could it justify the creation of such an obstacle as this publication created to complainant's return to his old home, unless he returned an object of pity, humiliation, and ridicule.

We agree, too, with the trial judge that the property in dispute "ought to be devoted to the purpose of his [complainant's] care and maintenance hereafter." We do not think, however, that the evidence in this case justifies the decree of the court below. Complainant, for a year and a half, enjoyed the comforts of a home with defendants, and would have continued to enjoy those comforts, had he not chosen, without just cause, to leave his home. Notwithstanding what has occurred, it is not at all unlikely that complainant may choose to return to defendants, and be entirely satisfied with his home with them. Defendants, by removing to the property in dispute, and

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carrying out this contract for the time specified, have equities which no court should disregard. At the same time we do not think that complainant should be compelled, against his will, to take up his residence in their home.

Under the circumstances of this case, a decree should be made compelling defendant Frank Whitney to reimburse complainant for the cost of his maintenance since the publication of the notice above quoted, to pay such a sum each week as will secure complainant's proper maintenance during such time as he shall choose to reside elsewhere than in defendants' house, and to pay the medical attendance and funeral expenses provided in the contract. The decree should, of course, recognize complainant's right to return to his home with defendants whenever he chooses to do so, and to receive there the full benefits of his contract, as originally contemplated. The conveyance in question should be declared a trust to secure the performance of these obligations, and, in case of their nonperformance, this trust should end, and the property revert to complainant.

As the record does not show what complainant has expended for his past maintenance, or what will be a proper allowance for his future maintenance, the decree will be reversed, and the case remanded to the court below, to take proofs, and to enter a decree in accordance with this opinion. Complainant is entitled to costs of the trial in the circuit court. Defendants will recover costs of this court. These costs shall not be collected from the money owing by them to complainant, or from the property which is the subject of this suit.

The other Justices concurred.

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HINTZ v. MICHIGAN CENTRAL RAILROAD CO.

1. RAILROADS — NEGLIGENT INJURIES AT CROSSING — STATUTORY SIGNALS—QUESTIONS FOR JURY.

   The testimony of the plaintiff, under the circumstances of this case, that defendant's train struck the wagon in which she and her husband were crossing defendant's tracks in the highway, causing the team to run away, whereby she was injured, and that they stopped, looked, and listened before crossing the tracks, and heard nothing, made a proper case for the jury.

2. APPEAL—NEW TRIAL—TRIAL BY JURY.

   The Supreme Court has no power to enter a verdict contrary to the finding of a jury, but it may, under 3 Comp. Laws, § 10504, reverse the decision of the circuit judge denying a motion for a new trial; such action is not contrary to the constitutional provision securing the right to a trial by a jury, as it gives the party a right to a new trial by another jury.

3. SAME—PRESUMPTIONS—DECISION OF TRIAL COURT.

   In determining whether a trial court should have granted a new trial, the Supreme Court will bring to the support of his decision all reasonable presumptions which arise from his superior opportunity to determine the credibility of witnesses.

4. SAME—PREPONDERANCE OF EVIDENCE.

   When it is apparent from the record, notwithstanding the presumptions in favor of the decision of the trial judge, that he erred in refusing to grant a new trial on the ground that the verdict was against the weight of the evidence, his decision will be reversed.

5. SAME—INJURIES AT RAILROAD CROSSING.

   In an action against a railroad company, plaintiff was the only witness who testified that the runaway of her team was caused by a collision with defendant's train; the trainmen testified that there was no collision, and several people residing near the crossing testified that her team ran away before reaching the crossing,—one that the train passed the crossing several minutes before the runaway. *Held*, that a verdict for plaintiff should be set aside as against the weight of the evidence.

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Error to Saginaw; Snow, J. Submitted January 13, 1903. (Docket No. 22.) Decided February 17, 1903.

Case by Anna Hintz against the Michigan Central Railroad Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

Watts S. Humphrey, for appellant.

Rowland Connor, for appellee.

CARPENTER, J. Plaintiff obtained a verdict and judgment in the court below for damages resulting from the alleged negligence of defendant. Defendant seeks a reversal of that judgment on three grounds: *First*, that there was no evidence from which the jury could find that the defendant was negligent; *second*, that the evidence conclusively established plaintiff's negligence; *third*, that the trial judge improperly denied defendant's motion to set aside the verdict on the ground that the same was against the weight and preponderance of the testimony.

The testimony introduced on the part of the plaintiff tended to prove that while crossing defendant's track, driving in an easterly direction, on Davenport street, in the city of Saginaw, defendant's regular passenger train collided with the vehicle in which plaintiff was riding with her husband, and as a result the horses drawing said vehicle ran away, the vehicle capsized, plaintiff's husband was killed, and she herself badly injured. On the other hand, the testimony of the defendant tended to prove that no collision whatever occurred between its train and the vehicle in which plaintiff was riding; that plaintiff's injuries were due to being thrown from the vehicle in consequence of the horses' running away; that the horses commenced running away before they reached defendant's track; and that they passed over said track after the train with which it is alleged the vehicle collided.

We are all agreed that the testimony introduced on the part of the plaintiff made a proper case for the jury. It

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may be inferred from her testimony that the employés of defendant in charge of the train in question did not give the statutory signals as said train approached the crossing, and that plaintiff and her husband stopped, looked, and listened before attempting to cross defendant's track.

The serious question in the case is raised by defendant's third ground for reversal. Is the verdict so clearly against the weight and preponderance of the testimony that it is our duty to overrule the decision of the trial judge, who said he was "satisfied the verdict is not against the weight of the evidence?" The right of this court to overrule that decision is challenged by plaintiff's counsel. It is urged by him that such an "interpretation of this statute [3 Comp. Laws, § 10504] would overthrow a fundamental and established theory of the purpose and scope of the Supreme Court." It is to be assumed that by this is meant that to set aside the verdict of a jury on the ground that the same is against the weight of the evidence is an invasion of the constitutional provision securing trial by jury. This contention, in our judgment, would be unanswerable, if this court did anything more than to set aside the verdict. If, for instance, this court should undertake to enter a verdict contrary to the finding of the jury, or if it should refuse to submit the case to the decision of another jury, it would assume to decide facts which the Constitution of the State says shall be decided by a jury. This court, however, does not, under the statute in question, undertake to do anything more than the judge presiding in the trial court has done for generations. Before this statute was enacted, this court, on repeated occasions, decided that it had no power to review such decisions of the trial judge. *Hake* v. *Buell*, 50 Mich. 89 (14 N. W. 710); *Nelson* v. *Mining Co.*, 65 Mich. 288 (32 N. W. 438); *Detroit Tug & Wrecking Co.* v. *Wayne Circuit Judge*, 75 Mich. 360, 371 (42 N. W. 968), and cases there cited; *Moore* v. *Daiber*, 92 Mich. 402 (52 N. W. 742); *Brassel* v. *Railway Co.*, 101 Mich., at page 13 (59 N. W. 426). The statute gives that power, and this

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court would disregard an obvious duty if it did not, in a proper case, exercise it. In exercising it, we are bound to recognize the principles which have always governed trial courts in determining whether or not verdicts should be set aside. We are also bound to bring to the support of the decision of the trial judge all reasonable presumptions which arise from his superior opportunity to determine the credibility of witnesses. When, however, in accordance with these principles, it is apparent from the record, notwithstanding every reasonable presumption in support of his decision, that the trial judge erred in refusing to set aside the verdict on the ground that it is against the weight of the testimony, the duty of this court to overrule that decision is manifest. *Whipple* v. *Railroad Co.*, 130 Mich. 460 (90 N. W. 287); *Baldwin* v. *Railway Co.*, 128 Mich. 417 (87 N. W. 380); *Cole* v. *Railway, ante*, 122 (92 N. W. 935).

With this understanding of our power and duty, let us consider the testimony in this case. The only witness whose testimony supports plaintiff's claim of the manner in which her injury occurred is the plaintiff herself. It is claimed that a Mr. Henry Hunt, whose testimony was introduced by the plaintiff, gave testimony tending to support her theory; but a careful examination of the record compels us to reach another conclusion. Mr. Hunt testifies that, just before the train crossed Davenport street, he saw a vehicle standing close by the track, and that, after the train had gone, he did not see this vehicle. This testimony seems to us colorless. On the other hand, Mr. and Mrs. Samuel Pigeon, who lived on Davenport street, west of the Michigan Central crossing, testified that they saw the team drawing the vehicle in which plaintiff was riding running away before they reached defendant's tracks, and that some of the articles in the wagon were thrown therefrom west of said crossing. Mr. Duff Pigeon, a brother of Samuel Pigeon, and who resided with him, testified that, as he came out of the house, he noticed something across the road, which proved to be a basket of

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quilts and bags thrown from the wagon of plaintiff's husband; that he was then told of the injury to plaintiff and her husband, and immediately went on east, and found them where they were thrown from the vehicle. John A. Rooker, a neighbor of the Pigeons, testified that, after hearing of the injury to plaintiff and her husband, he went where they were lying, and helped to put them into the wagon which carried them to the hospital; that he afterwards returned along Davenport street, and picked up the articles thrown from the wagon during the runaway; that he found some of these articles west of the Michigan Central crossing. Matilda Patterson, with whom the last witness boarded, and who also lived on Davenport street, west of the Michigan Central crossing, testified that the articles thrown from plaintiff's wagon were stored in her house, and were found west of the Michigan Central crossing. Sadie Beuthin testified that she was visiting her mother, who lived on Davenport street, a short distance (it could not have exceeded 300 feet) east of the Michigan Central crossing; that, after the train which it is claimed collided with the vehicle in which plaintiff was riding crossed Davenport street, she got ready and started to visit a friend who lived near the Johnson-street bridge, which is located about 1,200 feet east of said Michigan Central crossing; that, when she got near the bridge, a team of horses running away passed her; that she visited her friend, and then went to the place where plaintiff and her husband lay in the road; and that she reached that place about 30 minutes after the train had crossed Davenport street. The conductor, fireman, and engineer on defendant's train which it is alleged collided with plaintiff's vehicle all testified that no such collision occurred. The testimony of plaintiff proves that articles like those found west of the Michigan Central crossing were in the vehicle, and that they were lost on this occasion.

While there are inaccuracies and discrepancies in the testimony of some of defendant's witnesses which justly

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subject their testimony to criticism, it cannot be doubted that a runaway commencing west of the Michigan Central track occurred about the time of plaintiff's injury. Indeed, so convincing is this testimony that plaintiff's counsel concedes that such a runaway occurred, but he insists that that was a different runaway from the one in which plaintiff received her injury. He asks us to believe, and it is to be presumed that he asked the jury to believe, and that they did believe, that the runaway commencing west of the Michigan Central track, evidenced by these articles scattered along the street, which led up to the place where plaintiff and her husband were lying, was not the runaway which led to plaintiff's injury. He asks too much. To believe this, without any testimony tending to prove it, is too great a tax on our credulity, or, as we believe, on the credulity of any fair-minded person. Plaintiff's counsel also insists that there is nothing in the testimony of Sadie Beuthin inconsistent with his client's theory; "that she had no clock in the house, and that all her references to time were the purest kind of guesswork." We agree that her estimate of time is entitled to very little credit; but if, after hearing the train pass, she walked the distance she states before the runaway team overtook her, the inference that the team crossed the railroad track after the train passed is almost irresistible. That a jury should credit the testimony of an interested party, contradicted by this multitude of witnesses, and by the facts which it is conceded their testimony proves, naturally shocks the ordinary, fair-minded person. It is not to be presumed that another jury will reach the same conclusion.

Judgment reversed, and a new trial ordered.

HOOKER, C. J., MOORE and GRANT, JJ., concurred. MONTGOMERY, J., did not sit.

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AUDITOR GENERAL v. HUGHITT.

1. TAXATION—ALTERATION OF ROLL—FRAUD.
Where a supervisor fraudulently changed and reduced the valuation of certain lands on his assessment roll after the roll had been reviewed and completed, the entire tax roll was void.

2. SAME—CONSTRUCTION OF STATUTE.
1 Comp. Laws, § 3899, providing that, if any fraud affects the amount of one tax only, the tax shall be sustained so far as the same is legal and just, does not apply to the fraudulent reduction of an assessment, since such reduction affects every taxpayer.

Appeal from Iron; Stone, J. Submitted January 14, 1903. (Docket No. 106.) Decided February 17, 1903.

Petition by Roscoe D. Dix, auditor general, for the sale of lands delinquent for the taxes of 1898: On objections filed by Amos J. Hughitt and others. From a decree declaring the taxes void in part only, respondents appeal. Reversed.

The respondents are the owners of lands situated in the township of Iron River, Iron county. After the assessment roll had been made, reviewed, and completed, the supervisor (one Thomas H. Flannagan) corruptly and fraudulently changed and altered the valuations of certain lands in sections 17 and 21 in said township by reducing the valuation fixed by the board of review in the sum of $34,000. The assessment for the taxes for said year was made on such fraudulent valuation. The land whose value was reduced belonged to the Metropolitan Lumber Company. The total value of the real and personal property, after such fraudulent changes, was $281,025. The court below held the tax void to the amount of one-tenth thereof.

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Charles H. Watson, Prosecuting Attorney, for petitioner.

Isaac W. Byers (*Cook & Pelham*, of counsel), for respondents.

GRANT, J. (*after stating the facts*). The respondents insist that the entire tax roll is void because of the fraud, while the petitioner insists that the damage done to the respondents by the fraud can be separated, and the proper tax ascertained. The petitioner, in his brief, states his position as follows:

"The result was that the assessment roll was infected by an irregularity in matter of substance, which prejudiced the property rights of the defendants in the proportion which $34,000 bears to $281,025, the total footing of the roll."

In support of this claim he cites *Merrill* v. *Auditor General*, 24 Mich. 170; *White* v. *Township of Millbrook*, 60 Mich. 532 (27 N. W. 674); *Solomon* v. *Township of Oscoda*, 77 Mich. 365 (43 N. W. 990); *Auditor General* v. *Jenkinson*, 90 Mich. 523 (51 N. W. 643). It is claimed, also, that the rule is recognized in *Auditor General* v. *Prescott*, 94 Mich. 190 (53 N. W. 1058); *Auditor General* v. *Sparrow*, 116 Mich. 574 (74 N. W. 881); and *Auditor General* v. *Iron Co.*, 123 Mich. 521 (82 N. W. 260).

Prior to the passage of Act No. 206, Pub. Acts 1893, the provisions of the tax laws covering cases like the present read as follows:

"If any such illegality, omission, or fraud affects the amount of the tax only, the tax shall be sustained so far as the same is just and legal."

The clause in the present act (section 76) reads as follows:

"If any such illegality, omission, or fraud affects the amount of *one* tax only, the tax shall be sustained so far as the same is legal and just."

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The same section authorizes such tax to be set aside when fraudulently assessed. The most of the cases above cited arose under the former acts.

Every taxpayer in the township is prejudiced, except the one whose valuation was reduced. The tax roll is a forgery. It is not the roll made by the supervisor, reviewed by the board of review, and placed in the hands of the treasurer for collection. As we said in *Weston* v. *Monroe*, 84 Mich. 341 (47 N. W. 446): "Its legal identity is destroyed. It is not the roll authorized by law." A forged assessment roll possesses no more validity than does a forged note. Such tax rolls have been held void even where the changes were made in good faith, and where the parties had not been injured. *Ferton* v. *Feller*, 33 Mich. 199; *Weston* v. *Monroe*, *supra*. All the taxpayers of the township, except the Metropolitan Lumber Company, are prejudiced by this action, and must remain prejudiced, notwithstanding those who contest may get a reduction of one-tenth of their taxes. If the rejected portion thereof is to be reassessed the following year, the taxpayers will again be called upon to pay their proportions thereof. There is no provision of the law by which the injustice can be remedied except by holding the entire tax void. It cannot be remedied the following year by adding the amount thus fraudulently stricken from the roll to the assessment roll then to be made. All that the assessor could do the following year would be to assess this same property at its proper cash value. If the entire one-tenth of the present tax were set aside, there would be a deficiency to that amount in the revenue of that year. It must be raised the following year, and must be spread over the entire property of the township. If this property were assessed at its cash value the following year, the deficit of the year before would be spread over the entire township, and he in whose interest the fraud is perpetrated would go scot-free from paying a large part of what would be his proper proportion, while the other taxpayers of the township would pay much more than their proper share. The

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decision of the court below, if sustained, would enable such taxpayer to profit by the fraud, and to escape paying his proper share of the public burden. Only by setting the entire tax aside can the fraud be remedied, and all taxpayers placed upon an equality. We think it was the intention of the legislature to make these fraudulent tax rolls absolutely void. The entire tax must be held vitiated by the fraud, within the principle established in *Weston* v. *Monroe; Ferton* v. *Feller; Auditor General* v. *Iron Co.; Auditor General* v. *Sparrow, supra.*

Decree reversed, and decree entered in this court for the respondents.

The other Justices concurred.

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VARTY *v.* MESSMORE.

1. TRIAL—EVIDENCE—CONTENTS OF PAPERS.
   A case will not be reversed for permitting a witness to state the contents of certain papers, where it appears that the court did not intend to rule that the contents were admissible, and immediately struck out that part of the testimony on the suggestion of counsel.
2. NEW TRIAL—MISCONDUCT OF COUNSEL.
   It is only in a very clear case of misstatement of facts by counsel to the jury, which cannot be corrected, that the court will set aside the verdict.

Error to Sanilac; Beach, J. Submitted January 16, 1903. (Docket No. 59.) Decided February 17, 1903.

Assumpsit by Henry Varty against Charles L. Messmore for money had and received. From a judgment for plaintiff, defendant brings error. Affirmed.

F. E. Durning and *W. H. Burgess*, for appellant.

F. S. Viets (*E. C. Babcock*, of counsel), for appellee.

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MONTGOMERY, J. The defendant is a banker, and the plaintiff for several years was a depositor of defendant. The parties also had other dealings. The plaintiff brought an action to recover a balance claimed to be due him. Before entering upon the trial, the bills of particulars were examined, and the parties agreed upon all the items except three: One item of $200,—a note given by Samuel Callaghan to defendant, which the plaintiff claims to have purchased, and left with the defendant for collection; an item of a credit to plaintiff of $100 paid defendant March 26, 1891, by one Charles Snay; and an item of $196.65 charged to plaintiff by defendant for the payment of a real-estate mortgage given by John Callaghan to defendant, and claimed to have been discharged by him on plaintiff's order. The case was tried by a jury, and verdict found in favor of the plaintiff for $377.77. The defendant brings error, and we consider such points as are made in the defendant's brief.

The first error assigned is that the court erred in permitting the witness Yakes to testify and give the contents of certain attachment papers. An examination of the record convinces us that at no time did the court intend to rule that the contents of these papers were admissible, and immediately struck out the evidence of their contents, at the suggestion of the defendant. There was no error in this connection.

It is next assigned as error that the court refused the defendant's motion for a new trial. This motion is based upon two grounds: *First*, that the testimony did not warrant the verdict found; and, *second*, misconduct of the jury. We have examined the testimony with considerable care, and we are not able to say that the verdict was so manifestly against the weight of the evidence as to have justified the court in setting aside the verdict. It is true, defendant's counsel furnish us with various computations claimed to show that upon no theory should the verdict against the defendant have been quite as large as it is; but these figures are based upon assumptions as to

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interest charges which are not quite apparent to us, and we think the variance is not sufficient to justify us in disturbing the verdict.

Complaint was also made in the motion for a new trial of the alleged misconduct of counsel in arguing the case to the jury. We think there was no such misconduct as justifies us in setting aside the verdict. It was claimed the testimony was misstated; but there is nothing to indicate that there was any intentional misstatement of facts by the counsel. It is only in a very clear case of a misstatement, which is not open to correction, that the court would interfere to vacate a verdict.

Some errors are assigned upon the refusal of the court to give the defendant's requests; but a careful examination of the charge shows that every right of the defendant was fully protected by the instructions given, and that in all essentials the instructions were unusually clear, and directed to the case with which the jury had to deal. If the defendant has suffered any injustice in this case, it results from this: That, in a case in which there was sharp conflict in the testimony, the jury accepted the testimony on behalf of the plaintiff, rather than that on behalf of the defendant. The circuit judge, who saw the witnesses, was of the opinion that the plaintiff's verdict should stand. We do not think the case so clear as to justify us in overruling this decision, and the judgment will be affirmed, with costs.

The other Justices concurred.

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ROULO *v.* MINOT.

1. ELEVATORS—INJURY TO PASSENGER—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

   Plaintiff entered an elevator, and asked to be let off at the office of a tenant which was on the twelfth floor, but plaintiff did not know on which floor the office was located. All the passengers had left when the ninth floor was reached, where the elevator was stopped, and the doors opened, to let on a passenger, whom plaintiff did not see. Plaintiff, thinking the elevator had stopped to let him off, started to alight, and was caught and injured by the elevator starting at the same time. The conductor began closing the doors as the elevator started. *Held*, that whether the conductor was guilty of negligence, and plaintiff of contributory negligence, were questions for the jury.

2. SAME—OPEN DOORS.

   Under ordinary circumstances, an open door and a stationary elevator constitute an invitation to all persons to enter or leave at will.

Error to Wayne; Hosmer, J. Submitted January 7, 1903. (Docket No. 12.) Decided March 5, 1903.

Case by Gilbert C. Roulo against Laurence Minot and others for personal injuries. From a judgment for plaintiff, defendants bring error. Affirmed.

Edwin F. Conely and *Orla B. Taylor*, for appellants.

John T. Nichols and *Alexander H. Sibley*, for appellee.

MONTGOMERY, J. Plaintiff sues to recover damages for injuries received while attempting to leave one of the elevators in defendants' building. The case was submitted to a jury under instructions which are not complained of, and a verdict given for the plaintiff. The only question on this appeal is whether there is any evidence to support

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this finding. In considering this question, the testimony of the plaintiff must be taken as true, and shows the facts as follows: Plaintiff, who had never been in the elevator before, entered the elevator, and asked to be let off at the office of the Detroit, Romeo, Rochester & Lake Orion Railway. He did not know upon what floor the office was situated, and the elevator conductor did not inform him. As a matter of fact, the office was on the twelfth floor. When the elevator started, several persons were in it, but all had left except plaintiff before the ninth floor was reached. The elevator was provided with two doors on the same side of the car, which were operated simultaneously by the conductor, who stood between them, with his back to the car and passengers. Upon reaching the ninth floor, the elevator was stopped, and the doors were opened. There being no other person in the elevator, the plaintiff concluded that was the floor at which he was to get out, and that the elevator had stopped for him, and he started to leave the car. At this time the doors of the elevator were open, and the elevator stationary. Just as he was stepping out, the elevator started, and at the same time the conductor began to close the doors. Plaintiff was caught by the door of the entrance through which he was attempting to pass, and, before the elevator could be stopped, he was crushed against the overhead framework, and his back broken.

The manner in which the elevator was operated is, briefly, this: The conductor stands between the two doors, facing the hall. With his right hand he operates a wheel which causes the elevator to move up or down, depending on the way it is turned. With his left hand he opens and closes the two doors. He does both of these things at about one and the same time. It appears by the testimony of the conductor that the stop at the ninth floor was made in response to a signal, and for the purpose of taking on a passenger. The plaintiff testified, however, that he did not see this passenger enter the car, nor see him at all until after he was caught in the door as above

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described, while the conductor testifies that there was nothing to prevent the plaintiff's seeing the other passenger (Mr. Ronald). The plaintiff's statement is by no means incredible, as Ronald testifies he did not see plaintiff until he (Ronald) got into the elevator; and as plaintiff was facing one door, and Ronald entered at the other, his statement is reasonable.

The sole question is whether, under this state of facts, the case should have been withdrawn from the jury. The circuit judge instructed the jury as to the defendants' duty as follows:

"It is, of course, incumbent upon the person in charge of the elevator to use that ordinary degree of care which a person under like circumstances would use in closing the door and in starting the elevator; and I think you may properly find, if you see fit, from the case, that it was his duty to close the door, in this instance, before starting the car. But in view of what was said by the plaintiff, between the plaintiff and the conductor, at his entrance in the elevator, I am not prepared to say that you should find this; and you may, perhaps, gentlemen of the jury, as legitimately find that, under the circumstances of the case, the conductor had no reason to believe that he was to leave the car, and therefore acquit the conductor of negligence. I think what the duty was, and what was required of both parties at that point, presents a question for you, rather than a question for the court."

And, as to the care required of plaintiff under the circumstances, the court said to the jury:

"If you believe from the evidence that the plaintiff in this case, on or about the 5th of January, 1901, was rightfully in the elevator in the possession of and operated by the defendants in their building, for the purpose of being carried thereby from one floor of the building to another, and if you further believe from the evidence that while the plaintiff was so in such elevator, and in the exercise of reasonable and ordinary care on his part, the said elevator was stopped at one of the floors, and while said elevator was thus stationary, and the door thereof was open, the plaintiff, without negligence on his part, and with all convenient speed, attempted to get out, and before he could

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do so the servant of the defendants in charge of the elevator negligently and carelessly closed the door upon him, and suddenly started the elevator, by reason whereof plaintiff was injured, then the plaintiff would be entitled to a verdict at your hands. But I say to you with reference to that, gentlemen of the jury, that, considering the colloquy between the plaintiff and the conductor, you may consider the question of attempting to leave that car without warning to the conductor. I do not say that his attempt, as I said before, would in itself be evidence from which I could say to you that an attempt to leave was negligence; but I think it is a question for you, gentlemen of the jury, and for you to determine, where the negligence, if you find negligence, occurred at that point."

We think these instructions fairly presented the issues for the jury. Under ordinary circumstances, an open door and a stationary elevator constitute an invitation to all persons desiring to do so to enter or leave at will. An attempt to start the elevator without taking the precaution of closing the door might very well, in the absence of any fact which amounted to an assurance that no one expected to either enter or alight, be held negligence. And whether this duty of attention to the plaintiff was excused by the colloquy between the plaintiff and the conductor was, at the most, a question for the jury. And so whether, in view of this talk had between the plaintiff and the conductor on entering the car, the plaintiff was guilty of negligence in attempting to leave without first, in words, acquainting the conductor with his purpose, or whether he had the right to assume that the car would not be started until the door was closed, was likewise a question for the jury.

The judgment will be affirmed, with costs.

HOOKER, C. J., MOORE and GRANT, JJ., concurred. CARPENTER, J., did not sit.

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GARMAN v. HAWLEY.

1. WILLS—VESTED INTERESTS.
   A clause in a will bequeathing to a son a one-third interest in testator's real estate, followed by a clause directing the executor to keep the real estate together until the youngest granddaughter should arrive at the age of 21 years, rendering the net proceeds to the devisees according to their shares, unless he should think it would be better for all the heirs to make an earlier division, and providing that, if any heir should die before the youngest granddaughter should arrive at the age of 21 years, leaving no child, then his share should be divided equally among the surviving heirs, does not give the son a vested interest.

2. SAME—INTEREST OF DEVISEE.
   A mortgage of his interest in real estate under such will by the son, who dies, without issue, before the youngest granddaughter arrives at the age of 21 years, cannot be foreclosed.

3. SAME—POWERS—MORTGAGE.
   The clause in the will providing that the executor should keep the real estate together, unless he should think it better to make an earlier division, does not empower him to direct or consent to a mortgage on the undivided interest of a devisee.

Appeal from Van Buren; Carr, J. Submitted January 9, 1903. (Docket No. 26.) Decided March 5, 1903.

Bill by Henry Garman against Harriett B. Hawley and others to foreclose a mortgage. From a decree for complainant, defendants appeal. Reversed.

Thomas J. Cavanaugh, for complainant.

Lincoln H. Titus, for defendants.

MONTGOMERY, J. This is a proceeding in equity to foreclose a mortgage upon an undivided one-third interest in land which constitutes a part of the estate left by Moses S. Hawley at the date of his decease. The mortgage was

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executed after the decease of Moses S. Hawley by Miles G. Hawley, a legatee named in the decedent's will, and was also authorized by the executor named in the will. The provisions of the will which are material to the inquiry before us are as follows: After describing the testator's real estate, the will proceeds:

"I will and bequeath to my only son, Miles G. Hawley, one-third of the above-described real estate; one-third of said land to my daughter, Harriett B. Hawley; one-sixth to my granddaughter, Mary L. Stewart; and one-sixth to my granddaughter, Jane M. Stewart."

Here follow bequests of personal property, and the will then proceeds:

"It is my will, after the payment of my just debts, that the personal estate be divided, or sold, and the proceeds of the sale thereof be divided, between the foregoing heirs, as shall appear by this will to be their due, within one year from my decease.

"It is my will and wish that the said above-described real estate be kept together by the executor of this my last will and testament, and the net proceeds be rendered from time to time to said heirs according to their respective shares, until my youngest granddaughter, Mary L. Stewart, who is now fourteen years of age the 26th day of last September, A. D. 1892, shall become twenty-one years of age, when the whole may be divided, or sold and divided, between the said heirs, according to their respective shares, as herein designated.

"Unless matters should so shape that the executor of this will should think or thinks it would be better for all the heirs herein named to make an earlier division, then in that case it shall be the duty of the executor to see the division legally and properly done, and to see that each and every heir get their true share, according to the rendering of this will. (The expenses of production deducted.) If any of said heirs shall die before the youngest granddaughter shall become twenty-one years of age, leaving no child, then in that case his or her share be and become the property of the surviving heirs, and it is my will that it be divided equally among said surviving heirs."

Before Mary L. Stewart reached the age of 21 years, Miles G. Hawley died.

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The questions presented are two: *First*, whether Miles G. Hawley took a vested interest in the real estate, not subject to be defeated by his death before Mary L. Stewart attained the age of 21; and, *second*, whether the authorization of the mortgage by the executor binds the surviving heirs. We think both these questions should be answered in the negative. The complainant's counsel, in contending that the estate vested in fee in Miles G. Hawley at the death of Moses S. Hawley, invokes the rule that the presumption is in favor of a vested estate, and the further rule that a grant over of an estate following a grant in fee is void for repugnancy. Conceding full force to these rules, neither presents a serious obstacle to the ascertainment of the testator's intent, nor to effectuating it. The first clause above quoted is not in terms a devise in fee. Whether it is to be so treated depends upon the remaining terms of the will. By these terms it is made clear that (except in a certain contingency) the testator designed that the estate should be kept together until the granddaughter attained the age of 21, the legatees being paid the income merely; and that, in the event of the death of any legatee before that date, the share which would otherwise go to such legatee should be divided among the others. It is clear that no fee simple was intended. No power of disposition is given, and a contingent remainder is created as to each aliquot part. True, a somewhat broad power is given to the executor, but we cannot find in this an intent to create a fee simple. While the question is one of construction, and is not ruled by exact precedent, cases having a bearing are *Fitzhugh* v. *Townsend*, 59 Mich. 427 (27 N. W. 561); *Plant* v. *Weeks*, 39 Mich. 117; *Matter of Cramer*, 170 N. Y. 271 (63 N. E. 279); *Glover* v. *Reid*, 80 Mich. 228 (45 N. W. 91). See, also, article by Prof. Thompson, Mich. Law Review, vol. 1, page 427.

As before stated, a somewhat broad power is given to the executor. Did it give him authority to direct or assent to a mortgage of Miles G. Hawley's interest, which should

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extend to and cover a specific aliquot part of the real estate? Clearly not. The power was authorized only when the executor should think it best for all the heirs. And that power was a power of division, not a power to authorize incumbrances.

The decree will be reversed, and the bill dismissed, with costs of both courts.

The other Justices concurred.

MICHIGAN CENTRAL RAILROAD CO. *v.* CHICAGO, KALAMAZOO & SAGINAW RAILWAY CO.

1. CORPORATIONS—CONTRACTS—RAILROADS—USE OF SIDE TRACK—NOTICE.

   Where the president of a paper company, without authority from the board of directors, executed a contract with a railroad company for the rebuilding and use of a side track to the paper mill, the occupancy and use of such side track by the railroad for one year gave the paper company construc tive notice of the terms of the contract.

2. SAME—RATIFICATION.

   Where a paper company accepted the benefits of a contract of which it had constructive notice, but which it did not authorize its president to make, it will be presumed to have ratified the act of its president in making it.

3. SAME—STATUTE OF FRAUDS—PERFORMANCE.

   Where, in reliance upon a contract executed by the president of a paper company, a railroad company has rebuilt a side track to the paper mill, and used such track for one year, there is such a performance of the contract as will, in equity, take it out of the operation of the statute of frauds, and neither the authority of the president nor a ratification of his act need be in writing.

4. SAME—NOTICE—GRANTEE.

   A grantee of such paper company, having knowledge of the side track and its location and ownership, is charged with

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constructive notice of the railroad's rights under the contract.

5. CONTRACTS—SIDE-TRACK AGREEMENT—MUTUALITY—RIGHT TO TERMINATE.

A contract giving a railroad company the right to maintain and operate a side track "for and during such time as the business is carried on for the accommodation of which said side track is constructed" is not void for want of mutuality because it gives the railroad "the right to remove said track whenever, in its judgment, said business is not sufficient to justify it."

6. SAME—VALID AND INVALID PROVISIONS.

A harsh and inequitable provision in a side-track agreement, to the effect that the mill owner should assume all risk of damage to persons or property by reason of the use of the track, is no answer to an attempt to enforce other and valid provisions of the contract.

Appeal from Kalamazoo; Adams, J. Submitted January 9, 1903. (Docket No. 19.) Decided March 5, 1903.

Bill by the Michigan Central Railroad Company against the Chicago, Kalamazoo & Saginaw Railway Company and the Kalamazoo Paper Company to enjoin interference with certain side tracks. From a decree dismissing the bill, complainant appeals. Reversed.

N. H. Stewart (*Ashley Pond* and *Henry Russel*, of counsel), for complainant.

Howard & Howard, for defendants.

CARPENTER, J. Complainant appeals from a decree of the circuit court for the county of Kalamazoo, in chancery, dismissing a bill of complaint in which it seeks an injunction to prevent defendants violating rights which it claims by virtue of the following contract:

"This agreement, made this fourteenth day of April, A. D. 1898, between the Wolverine Paper Company, hereinafter, for convenience, called the 'first party,' and the Michigan Central Railroad Company, hereinafter called the 'second party,' witnesses:

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"*Whereas*, the first party has requested the second party to construct and lay a side track one and one-half miles east of Kalamazoo station, to be connected with a side track of the second party, on the south side thereof, extending southeasterly from the point of connection with the main track of the second party eight hundred (800) feet, of which thirty (30) feet will be laid on land of the second party and about 770 feet on land owned or occupied and controlled by the first party, substantially as shown on the plan hereto attached and made a part hereof; and

"*Whereas*, the second party has consented and does hereby consent to construct said side track as requested by first party, upon the terms and conditions hereinafter mentioned, and to which the first party hereby assents and agrees to perform, as follows, viz.:

"The first party hereby grants to the second party the right to construct, maintain, and operate said side track, substantially as shown on the plan hereto attached and made a part hereof, upon the land owned or occupied and controlled by the first party as aforesaid, for and during such time as the business is carried on for the accommodation of which said side track is constructed.

"The ownership of said track shall be vested in the second party, and it shall have the right to use, without cost or charge therefor, the whole or any part of said track, for other business than that of the first party, when the same is not actually occupied by cars which are being loaded or unloaded by the first party; and the second party shall have the right to take up and remove said track and appurtenances from said premises whenever the business of the first party, for the accommodation of which the same is laid, shall be discontinued, or whenever, in its judgment, such business shall not be sufficient to justify it in maintaining said side track.

"That the second party will maintain said side track at its own expense, except that, in case the freight which the first party shall receive at or forward from said side track over lines of railroad owned or operated by the second party shall amount, during each year from the date hereof, to less than one car load for each foot of said track laid on land owned or controlled by the first party, as aforesaid, exclusive of cars that may be handled by the second party in the way of switching and in connection with shipments over other railroads, the second party shall bear only such

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proportion of the annual cost of maintenance of the part of said track laid upon land owned or controlled by the first party as the number of cars of freight, as aforesaid, bear to the number of feet of track laid upon land owned or controlled by the first party; and the first party shall pay the second party the balance of said annual cost.

"The first party shall not erect any structure, temporary or otherwise, over or above said track, at a lower level than twenty-two feet above the track rails, nor nearer to the sides of the rails than five feet, without the consent of the second party in writing; shall not permit any other railroad company to connect its track with the side track so constructed; shall exercise the greatest care in the use of said track, to prevent cars or other obstructions from getting out upon or too close to the main or other tracks of the second party; shall secure the safe closing and locking of all switches on land of first party, and use such means and care as will tend to avoid accidents of any kind; shall pay and indemnify the second party for all damage to cars or contents by fire originating upon the premises of the first party, and which shall not be caused by the engines or servants of the second party, while such cars and contents are upon said track for the use of or in connection with any business of or for the first party; and shall and hereby does assume all risk and liability for all loss, injury, or damage to property or persons, other than the property of the second party (except to cars and contents as hereinbefore provided), and other than persons in the employ of the second party, that may occur or be caused at any time by reason of the use of said side track, or by the men, engines, cars, or other means and agencies employed by the second party in the use of the same, in connection with any business of or for the first party, whether the same be caused by negligence or otherwise. That the first party shall, at equal rates, give the second party the preference, and as long a haul as possible, on all competitive traffic to and from said side track.

"In testimony whereof, the parties hereto have caused these presents to be executed in triplicate, the day and year first above written.

"WOLVERINE PAPER CO.,
"By C. N. CHASE, President.
"M. C. R. R. CO.,
"By R. H. L'HOMMEDIEU."

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When this contract was made, complainant owned and maintained a side track to the mill and on the premises of the Wolverine Paper Company. It was contemplated by the parties that the side track contracted for should be constructed by making changes in the one already existing. Accordingly, complainant made these changes, and said side track was used, as agreed in said contract, until a short time before this suit was commenced.

On or about April 14, 1899, said Wolverine Paper Company sold its plant and part of its personal property to the Kalamazoo Paper Company, one of the defendants in this suit. In the fall of 1900, defendant the Kalamazoo Paper Company, desiring to have part of its freight carried by its codefendant, the Chicago, Kalamazoo & Saginaw Railway Company, requested complainant to remove its track from the south side of the mill, and let the defendant railway operate from that quarter, or to enter into an arrangement by which the two railroad companies should occupy and operate complainant's tracks jointly; and threatened, in case of refusal, to tear up and throw out said tracks, and let defendant railway in. At the time this threat was made, both defendants were taking action indicating a purpose to carry it into execution. Thereupon this suit was commenced for the purpose of securing an injunction preventing such proposed action. A decree was made in the court below dismissing the bill, and enjoining the complainant from interfering with the proposed action of defendants, unless it signified in writing an acceptance of the proposition from the defendant railway company to sell one-half its side track at actual cost, and use the same in common.

The only questions presented in this case relate to the validity and construction of the written contract heretofore quoted. Defendants urge:

(1) That the contract in question is invalid, because executed only by the president of a corporation, who had no authority from its board of directors.

(2) That the contract, even though binding upon the

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Wolverine Paper Company, is not binding upon its grantee, the Kalamazoo Paper Company, defendant in this suit.

(3) That the contract is void on its face for lack of mutuality.

(4) That the contract is not such an instrument as a court of equity will enforce.

Let us consider each of these objections separately.

1. Is the contract void because executed by the president, without authority from the board of directors, of the Wolverine Paper Company? For the purposes of this opinion, it may be conceded that the president had, by virtue of his office, no authority to execute this contract, and that the board of directors never authorized, nor by resolution ratified, his action. It appears, however, that immediately after its execution the contract was performed by complainant, and that the Wolverine Paper Company enjoyed its benefit for about a year, and until the sale of its mill to the Kalamazoo Paper Company, defendant in this suit. Complainant's occupancy and use of its track gave the Wolverine Paper Company constructive notice of the terms of its contract. *Detroit, etc., R. Co.* v. *Brown*, 37 Mich. 533. Having accepted the benefits of this contract, of which it had constructive notice, the corporation may be presumed to have authorized or ratified the act of its agent in executing it. *Davies* v. *Steel Co.*, 6 App. Div. 166 (39 N. Y. Supp. 791); *Pittsburgh, etc., R. Co.* v. *Bridge Co.*, 131 U. S. 371 (9 Sup. Ct. 770); *Jacksonville, etc., R. Co.* v. *Hooper*, 160 U. S. 514 (16 Sup. Ct. 379); *Scott* v. *Railroad Co.*, 86 N. Y. 200; 2 Cook, Corp. § 716. The decisions of this court which hold that, by reason of the statute of frauds, such authority or ratification must be evidenced by a writing, have no application, for here there was such a performance of the contract as to take it, in equity, at least, out of the operation of the statute; and, this being a suit in equity, the equitable rights of the complainant will be protected.

2. Was the contract binding upon the Kalamazoo Paper

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Company, defendant herein? According to the contract, the right was granted to complainant—

"To construct, maintain, and operate said side track, substantially as shown on the plan hereto attached and made a part hereof, upon the land owned or occupied and controlled by the first party as aforesaid, for and during such time as the business is carried on for the accommodation of which said side track is constructed."

It is urged that the business referred to is the business carried on by the Wolverine Paper Company, though it appears that the defendant the Kalamazoo Paper Company carries on substantially the same business in the same place, and, until a short time before this suit was commenced, had the benefit of the use of the side track under consideration. It is sufficient to say of this contention that we are pointed to and can find nothing in the contract supporting it. The business referred to is the business carried on at the plant in question. It is insisted that this contract is not binding upon defendant the Kalamazoo Paper Company, because it had no notice of the same until after it had made its purchase from the Wolverine Paper Company, and until a short time before this suit was commenced. It was, however, chargeable with notice, and did know, of the existence, location, and ownership of these tracks. It was bound to infer, from this knowledge, some arrangement between the complainant and its own grantor. If it wished to know what that arrangement was, it had only to inquire, and obtain that knowledge. Clearly, the facts were such as to charge defendant with constructive notice of complainant's rights. *Detroit, etc., R. Co.* v. *Brown*, 37 Mich. 533. Nor is there, as defendant contends, anything in the case of *Pontiac, etc., R. Co.* v. *Reed*, 130 Mich. 661 (90 N. W. 658), inconsistent with these views. Indeed, that case proceeded upon the theory that the contract made by his grantor bound defendant.

3. Is the contract void for lack of mutuality? The contract gives complainant—

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"The right to take up and remove said track and appurtenances from said premises whenever the business of the first party, for the accommodation of which the same is laid, shall be discontinued, or whenever, in its judgment, such business shall not be sufficient to justify it in maintaining said side track."

It is urged that, because complainant is given the right to determine, under certain conditions, when its track shall be removed, the contract is so lacking in mutuality as not to bind the defendant. Defendants rely upon *Davie* v. *Mining Co.*, 93 Mich. 491 (53 N. W. 625, 24 L. R. A. 357), and other like cases, which hold that the courts will not enforce, nor permit damages to be awarded for the breach of, executory contracts which may be terminated at the will of one of the parties. These cases are clearly distinguishable from the case at bar. The proposition that one has no right to damages for the nonperformance of an executory contract which he may terminate at pleasure is entirely different from the proposition that he has no rights whatever in an estate terminable at his will, and which he has acquired by the expenditure of a large amount of money. By the contract under consideration, complainant acquired an easement. *Taylor* v. *Navigation Co.*, 105 N. C. 484 (10 S. E. 897). After its execution the agreement was no more void for lack of mutuality than is a lease for a definite term, terminable at the option of the tenant. It was clearly the intention of the contract to grant complainant the right to maintain and operate its track "for and during such time as the business is carried on for the accommodation of which said side track is constructed," with "the right to remove said track whenever, in its judgment, said business is not sufficient to justify" its maintenance; and this intention should be given effect, unless it contravenes some principle of law. We can discover no such principle. The case of *Pontiac, etc., R. Co.* v. *Reed*, 130 Mich. 661 (90 N. W. 658), is not in point. The contract there did not, as does the contract here, grant to the railroad company the

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right to maintain and operate its track "during such time as the business is carried on for the accommodation of which said side track is constructed;" but it did contain an express provision giving the railroad company the right to remove the track after three years, and it was held that the proper construction permitted the maintenance of the side track as long as the owner "should desire, and no longer; subject, however, to the right of the company to remove after the expiration of three years."

4. It is insisted that there are some provisions in this contract so harsh and inequitable that the contract should not be enforced. As an instance of these provisions, reference is made to the clause in the contract whereby the paper company assumes all risk and liability for loss, injury, or damage to property or persons, other than the property of complainant and persons in its employ, caused by reason of the use of said track. We are not called upon in this case to enforce, or even to uphold the validity of, this provision. Its invalidity affords no answer to the attempt to enforce other, and, in our judgment, valid, provisions of the contract.

The decree of the court below is reversed, and one entered here for complainant in accordance with the prayer of its bill. Complainant will recover costs of both courts.

The other Justices concurred.

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SCULLY v. DETROIT IRON FURNACE CO.

1. CONTRACT OF SALE—PROPOSAL—ACCEPTANCE.
   Plaintiff offered to buy 5,000 cords of wood of defendant. In reply defendant wrote that it would "proceed to get out wood" for plaintiff, providing certain changes in terms, which it proposed, were made, and that the balance of the terms were entirely satisfactory. By subsequent correspondence the proposed changes, which did not relate to the amount, were accepted. *Held*, that defendant, by writing, "The balance of the terms are satisfactory," contracted to deliver 5,000 cords of wood.

2. SAME—BREACH—OFFER OF COMPROMISE.
   An offer by plaintiff to accept less than the amount of wood contracted for upon certain conditions, which were not fulfilled, did not relieve defendant from liability for not delivering all the wood contracted.

Error to Wayne; Donovan, J. Submitted January 13, 1903. (Docket No. 30.) Decided March 5, 1903.

Assumpsit by Walter J. Scully against the Detroit Iron Furnace Company for the breach of a contract for the sale of wood. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Alex. J. Groesbeck, for appellant.

Wells, Angell, Boynton & McMillan, for appellee.

CARPENTER, J. By correspondence, the parties to this suit made a contract, whereby the plaintiff agreed to buy wood from the defendant. Only 641¾ cords of wood, which was all that defendant could procure, was delivered to plaintiff. Plaintiff, being compelled to pay for other wood more than the contract price, brought this suit to recover damages, claiming that the defendant had agreed to sell 5,000 cords. The trial judge decided, as contended

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by defendant, that it had made no such agreement, and directed a verdict in its favor. To determine the correctness of this decision, we must examine the correspondence which constitutes the contract.

On the 6th of December, 1898, plaintiff wrote defendant as follows:

"Referring to my telephonic communication with your Mr. Black today, and my interview with Mr. Calkins here in the office, Mr. Calkins made me a price of $1.60 a cord, 128 cubic feet, for hardwood beech and maple, at least 75 per cent. hard maple, * * * to be * * * piled alongside the track at Gaylord, subject to my orders. * * * Under this arrangement, you can proceed to get the wood out, * * * to the amount of 5,000 cords, you to guarantee the delivery to me of such wood as is measured, inspected, and paid for, and requested for shipment on my order. Kindly advise me as soon as possible when you commence operations."

In response to this letter, defendant wrote:

"In the main, the terms of your letter are correct; but we cannot guarantee that at least 75 per cent. of the wood will be hard maple. As Mr. Calkins stated to you, in his judgment it would run about that. We will proceed, without further delay, to get out wood for your account, providing this point regarding the hard maple is mutually understood. We will guarantee delivery to you of all such wood as you have measured, inspected, and paid for at Gaylord, when requested for shipment, with the exception that we will not be responsible for loss by fire. * * * The balance of the terms of your letter are entirely satisfactory."

To this plaintiff replied on the 7th of December:

"If you will have the wood run as near 75 per cent. hard maple as possible, it will be satisfactory. In regard to piling the wood, I hope you will have the same piled in a nice high and dry place. * * * As the matter stands now, I will have to run the risk on the fire question."

Defendant answered the foregoing on the 8th of December, as follows:

"In getting out wood for you at Gaylord, we will

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endeavor to have it as near 75 per cent. hard maple as possible. Our Mr. Calkins has returned to Gaylord, and I have directed him to get out the wood for your account as soon as possible. I have also instructed him as to the piling of it, etc., in accordance with the terms of your letter."

We think the trial judge erred in deciding that the correspondence did not obligate the defendant to deliver 5,000 cords of wood. It is true that the defendant, in accepting the plaintiff's proposition, did not expressly promise to furnish any particular quantity. It is also true that defendant stated in its letter of December 7th that, if an arrangement was concluded, it would "proceed to get out wood for your account." But we must treat the concluding sentence of the letter, "The balance of the terms of your letter are entirely satisfactory," as an assent to the proposition contained in plaintiff's letter of December 6th, "to get the wood out to the amount of 5,000 cords." By the contract proved by the correspondence, we must, therefore, hold that plaintiff offered to buy and defendant agreed to sell 5,000 cords of wood.

The case of *Toomey* v. *Atyoe*, 95 Tenn. 373 (32 S. W. 254), relied upon by the defendant, is not in point. There the contract obligated Atyoe Bros. & Co., mill owners, "to saw such logs into lumber as are by the party of the first part [Toomey] furnished on the sawmill grounds, to the amount of 1,000,000 feet." It was said:

"Atyoe Bros. & Co. obligated themselves in that agreement to saw such logs into lumber as Toomey might furnish, 'to the amount of 1,000,000 feet,' if he should deliver so much; but he did not contract that he would in fact furnish enough logs to make that amount of lumber."

In the case at bar, as already stated, defendant, by accepting plaintiff's proposition, agreed to "proceed to get the wood out to the amount of 5,000 cords."

On the 7th of March, 1899, in answer to a letter from defendant informing him that nothing like the quantity of wood looked for could be obtained, plaintiff wrote:

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"I am somewhat disappointed at the nondelivery of the wood, but if he [defendant's agent] is able, in the early spring, to give me a large quantity of wood ready for fall shipments, this will answer very nicely."

Defendant claims that this language "shows clearly enough that, to his mind, there was no agreement in the letters such as is now claimed." If it were true that this did clearly indicate plaintiff's mind that no such agreement was contained in the letters, it would not destroy said agreement, if it was, as we think, actually made. This language does not, however, clearly indicate that, in plaintiff's mind, there was no such agreement. It is open to the construction that he will, under certain conditions, accept less than his contract rights. Inasmuch as defendant did not comply with these conditions, that letter seems to us to be entirely without significance.

Defendant insists that, while it is obvious from the letters themselves that it did not obligate itself to deliver 5,000 cords of wood, this intent "is made more clear when we consider that, at the time of the correspondence, both parties knew that the quantity of wood which could be had was wholly uncertain." It is not contended that we can consider what only one of the parties knew for the purpose of determining the meaning of correspondence which we do not find to be ambiguous. Without, by any means, deciding that we have a right to consider what both parties knew, it is sufficient to say that such consideration would not affect our conclusion; for, according to plaintiff's testimony, while he knew that the amount of wood which defendant could get out was uncertain, he had reason to believe that that amount would be, and that defendant could safely agree that it should be, 5,000 cords.

Judgment will be reversed, and a new trial granted.

The other Justices concurred.

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MORIN v. ROBARGE.

1. PLEADING—COMMON COUNTS—WORK AND LABOR—SPECIAL CONTRACT.
   A party may recover under the common counts for work and labor performed under a special contract fixing the price of the labor, where the contract is fully performed except to pay for the work and labor.

2. EVIDENCE—WITNESSES—IMPEACHMENT.
   Testimony by plaintiff, on rebuttal, of a conversation between himself and defendant's witness, objected to on the ground that the question had not been asked the witness, was not prejudicial, where its import was the same as that denied by the witness.

3. INSTRUCTIONS—STATEMENTS OF FACT.
   An instruction by the court that defendant admitted that a contract was made, upon which plaintiff entered and performed a large amount of work, was justified by the testimony of defendant's witnesses, though he was not present at the trial.

4. APPEAL—ASSIGNMENTS OF ERROR.
   A point not raised by an assignment of error will not be considered.

Error to Cheboygan; Shepherd, J. Submitted January 14, 1903. (Docket No. 205.) Decided March 5, 1903.

Assumpsit by James Morin against Benjamin Robarge for work and labor. From a judgment for plaintiff, defendant brings error. Affirmed.

Cross & Harpster, for appellant.

C. F. Hull and *C. S. Reilley*, for appellee.

CARPENTER, J. Under the common counts in *assumpsit*, plaintiff recovered in the court below a verdict and judgment for $1,331.98. The testimony of plaintiff tended to prove that defendant owed him over $1,500 for manu-

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facturing poles, posts, and ties, in pursuance of an oral contract. The testimony of defendant tended to prove that nothing was due the plaintiff. Issues were raised by the testimony of the parties respecting both the terms of the contract and the amount of work done thereunder. These issues were submitted to the jury, who, as above stated, found for the plaintiff. We are asked to reverse the judgment on several grounds.

1. It is claimed that the plaintiff could not recover under the common counts, because there was a special contract to pay a special price for the work in question. He relies upon the case of *Beecher* v. *Pettee*, 40 Mich. 181, which clearly is not in point, as it simply decides that damages for not being suffered to fulfill a contract cannot be recovered under the common counts. It is well settled by the decisions of this court that where a contract has been performed, and nothing remains to be done except to pay for work and labor or material furnished thereunder, recovery can be had under the common counts; and this is true though the value of the work or the material is fixed by a special contract. *Howell* v. *Medler*, 41 Mich. 641, 643 (2 N. W. 911); *Fletcher* v. *Bradford*, 45 Mich. 349 (7 N. W. 905).

2. Complaint is made because the court permitted the following question to be asked plaintiff: "What did he [defendant's inspector] say to you about the way or manner of inspecting these poles?" This was objected to on the ground that no question had been asked the inspector, who was one of defendant's witnesses, about his manner of inspection. He had, however, on cross-examination, denied that he told plaintiff "he was doing the Robarges on the inspection," and that "he was getting the advantage of them." In answer to the question complained of, plaintiff stated that, during the inspection, the inspector said that "he had got him [Robarge] so jollied up that he could do with him just as he wanted to." While this was not precisely what the witness had denied saying, its import was the same, and defendant was therefore not prejudiced.

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3. In charging the jury, the court said:

"The defendant admits that the work was done, not to the extent claimed by the plaintiff, but that there was a contract made, upon which the plaintiff entered and performed a large amount of work."

This is complained of, as we infer from the brief, because defendant himself was not present at the trial in the court below. The statement is, however, justified by the testimony of defendant's witnesses.

4. It is also claimed that the plaintiff was improperly permitted to recover for doing work after the time specified in his bill of particulars. This point is not raised by any assignment of error, and therefore will not be considered by this court.

5. It is urged that the court erred in not granting a new trial because of newly discovered evidence, and because there was no evidence tending to prove the amount of the verdict as rendered. The so-called newly discovered evidence was merely cumulative, and we think the trial judge was justified in saying that he failed to find therein anything that would change the finding of a jury on another trial. We agree with him, too, that the verdict was not greater than the evidence justified.

The other grounds upon which we are asked to reverse the judgment are also without merit, and their discussion would serve no useful purpose. We think the case was fairly tried, and submitted to the jury on a charge which fully protected defendant's interests.

Judgment is affirmed.

The other Justices concurred.

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SNYDER *v.* O'BEIRNE.

1. PARTNERSHIP—FAILURE TO PERFORM AGREEMENT—PROFITS.
   Where, under a partnership agreement for cutting and manufacturing timber, complainant was to furnish the timber, defendant to defray the expenses, and the proceeds were to be divided equally, and a large amount of timber was cut, defendant, who failed to make further advances, and forbade complainant to sell the lumber, cannot thereafter claim profits which might have resulted from the successful operation of the enterprise.

2. SAME—ACCOUNTING—DEBTS.
   On a bill for an accounting, unpaid accounts against a partnership should be paid by the receiver out of the assets, and not charged to either party.

3. SAME—HARMLESS ERROR.
   A decree of the circuit court for complainant on a partnership accounting will not be decreased because of an error in giving complainant a credit, which is more than offset by an excessive credit to defendant, due to a concession based upon a mistaken computation, though complainant has not appealed.

4. APPEAL—DECREE—AMOUNT.
   A decree will not be increased in amount in favor of a party who has not appealed.

Appeal from Clare; Dodds, J. Submitted January 15, 1903. (Docket No. 44.) Decided March 5, 1903.

Bill by Amos W. Snyder against William O'Beirne for a partnership accounting. From a decree for complainant, defendant appeals. Affirmed.

C. W. Perry and *C. H. Rose*, for complainant.

V. H. & H. H. Smith, for defendant.

CARPENTER, J. This is a bill for a copartnership accounting. In the fall of 1899 the parties to this suit

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formed a partnership, by verbal agreement, to cut and manufacture into lumber the timber then standing upon land owned by complainant. Complainant agreed to furnish the timber, defendant to defray the expenses, and the net proceeds were to be divided equally between them. After about 300,000 feet of logs had been cut, and part of the same manufactured into lumber, a controversy arose between the parties as to the terms of the partnership agreement, and as to the performance of their respective obligations thereunder. This controversy resulted in the present suit, in which both parties agreed in asking for an accounting, but differed radically as to their respective rights. The testimony was taken in open court. The court below made a decree directing the receiver theretofore appointed to close up the affairs of the partnership, to pay complainant $17.16, the balance found to be his due, and to divide the remaining proceeds equally between complainant and defendant. From this decree defendant appeals, claiming the same to be erroneous in various particulars, which, so far as needful, will be discussed in this opinion.

1. Defendant claims that he should have been allowed on said accounting the amount of $1,975, as compensation for his interest in the timber uncut in the spring of 1900. It is a sufficient answer to this claim to say, as we shall endeavor to show, that the defendant released the complainant from all obligation to carry out the copartnership contract by failing to make the advances necessary to its success. It appears quite clearly from the testimony that in the month of March, 1900, after the timber had been cut and deposited in a lake, defendant left the scene of operations in Clare county, and went to his home, in Ionia county, promising to return in a few days. He did not return until the 15th of the following November. He made no arrangement whatever for the sawing of the logs in the lake, though the copartnership agreement clearly contemplated that they should be sawed during that season. The complainant, acting within his rights, as we

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are bound to decide, let the contract to one Cline to saw said logs. August 23, 1900, after complainant had advanced to Cline $108.71, he wrote defendant, "Unless I hear from you at once, I shall be compelled to offer the lumber at a loss." Defendant, by letter of August 27th, forbade complainant selling any of the lumber, and on the 24th of September forbade both sawing and selling. Complainant being unable, from his own resources, to pay any more on the sawing account, the lumber was seized on an attachment to satisfy the liens of laborers, and subsequently sold. Defendant was notified of this attachment, but took no action. When defendant came to Clare county in November, 1900, he refused to reimburse complainant's advances and to pay his account. As above indicated, we are clearly of the opinion that this conduct of defendant was a clear breach of his obligation. He failed to make the advances essential to the success of the undertaking, and thereby released complainant from all obligation to carry on the copartnership. He cannot now claim the profits which might have resulted from the successful operation of the enterprise.

2. Defendant objects to the action of the trial court in giving complainant credit for his own services, for hay furnished the copartnership, and for the unpaid accounts against the copartnership of William Walker and Arthur Pugsley; and he contends that complainant received an excessive allowance for the moneys advanced to Cline, and for milk furnished the copartnership. It is a sufficient answer to all these objections, except those which relate to the Walker and Pugsley accounts, to say that, in our opinion, the testimony clearly warranted the action complained of.

Complainant should not, however, have received credit for $12 due William Walker and $12 due Arthur Pugsley. These were unpaid accounts against the copartnership, and should be paid by the receiver out of the partnership assets. Crediting these accounts to complainant did not discharge defendant or the copartnership from liability therefor.

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In our opinion, however, the error of the court in giving this credit to complainant was more than offset by an excessive credit to defendant. The trial court, acting upon a concession of complainant's counsel, which obviously resulted from a mistake in computation, assumed defendant's total credits to be $535.15. This was, to say the least, more than $24 in excess of his actual total credits, as shown by complainant's brief and by a careful examination of the record. While we would not permit counsel to repudiate such an admission for the purpose of unsettling a decision made thereon, it would obviously be unjust to reduce the amount of this decree, which is already too low, because of such mistaken concession. For the purpose of sustaining the decree of the court below, it would be inequitable to prevent complainant's proving that the amount allowed him was too small.

3. Complainant, who did not appeal from the court below, asks us to revise the finding of the circuit judge, and to increase the amount allowed to him. His failure to appeal gives us no right to increase that allowance.

The decree of the court below will be affirmed.

The other Justices concurred.

WAGNER v. WAGNER.

1. HUSBAND AND WIFE—SEPARATE MAINTENANCE.
   Where a wife obtains a decree for separate maintenance from her husband, the monthly allowance should cease with his death, and then she should be left to her interests in his estate according to law.

2. SAME—APPEAL—SOLICITOR'S FEE.
   On an appeal by a wife from a decree for separate maintenance, she cannot complain because the amount decreed to be paid by the defendant to her former solicitor is excessive.

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Appeal from Wayne; Rohnert, J. Submitted January 15, 1903. (Docket No. 50.) Decided March 5, 1903.

Bill by Susanna Wagner against John Wagner for a separation from bed and board and for maintenance. From the decree rendered, complainant appeals. Modified.

Complainant filed a bill against the defendant, her husband, for a decree from bed and board, under section 8622, 3 Comp. Laws, and for separate maintenance, under section 8654. She obtained a decree in accordance with the prayer of her bill, but has appealed from that part of the decree fixing the amount allowed her for separate maintenance, and directing her to release to the defendant all interest in the lands which stand in her name, and in which she has any interest of her own. It was conceded upon the hearing that the decree should be modified as to the property standing in her name.

The decree allows her $600 a year, to be paid in monthly installments, of $50 each, so long as she cares for and maintains the youngest child of said defendant and complainant, and until said child attains the age of 14 years. After that time she is to receive $480 a year, payable in installments of $40 per month. The defendant is ordered to deposit with one Johnson, as trustee, securities amounting to $10,000, to stand as security for the payments decreed to her. In lieu of this fund, the defendant was decreed the option to furnish a fidelity bond of some responsible fidelity company, to be approved by the court, in the penal sum of $10,000, conditioned on the faithful performance of the acts of the defendant decreed to be by him performed; said bond to be deposited with the court. The complainant was further given a life lease of the premises then occupied by complainant and defendant as a homestead, retaining to the defendant the privilege of occupying free of charge the second story of the house situated on the lot. The provisions made for her support were

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to be in lieu of dower, and any interest she had or might have in his real and personal property. The court found that the defendant's real and personal property was worth $62,145, and that his debts were $8,997.40; leaving him worth, over and above his debts, the sum of $53,147.60.

James H. Pound, for complainant.

Brennan, Donnelly & Van De Mark, for defendant.

GRANT, J. (*after stating the facts*). Whether, on a decree of separation and separate maintenance, the chancery court has the power to determine that allowance for support during the wife's life shall be in lieu of all her other interests in her husband's property, while living and after his death, we need not determine. We do not think it just or equitable that the allowance for support in such a case should cut off all interest in his property by virtue of her marital rights, which are not severed, but only suspended. According to the absolute terms of this decree, she would have no interest in his estate in the event of his death at any time, except that a fund should be set aside to secure to her the monthly allowance decreed. We think the decree for separate maintenance should end with his death, and that then she should be left to her interests in his estate according to the law. While the amount allowed by the decree is not what might be termed liberal, yet, under the terms of the decree, it may be changed at any time upon application of the complainant. The court may then increase her allowance as her own condition and the financial condition of the defendant require.

Complaint is made by the present solicitor for the complainant, who appeared in the case after the decree was rendered, of the amount decreed to her former solicitor. This amount does not concern complainant, and the defendant has not appealed from it.

The decree will be modified as above stated, and the complainant will recover the costs of this court.

HOOKER, C. J., MOORE and MONTGOMERY, JJ., concurred. CARPENTER, J., did not sit.

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KREBS *v.* SENIG.[1]

CHANCERY DECREE—JURISDICTION.

A decree is not void for want of jurisdiction because the judge had previously filed an opinion stating that the testimony was conflicting, and not clear, and that the decree would remain open for further hearing upon matters to happen after the filing of the opinion, though there was no subsequent hearing.

Appeal from Wayne; Donovan, J. Submitted February 20, 1903. (Docket No. 116.) Decided March 5, 1903.

Bill by Charles Krebs against Sophia Senig to set aside a deed. From a decree for complainant, defendant appeals. Affirmed.

M. B. Breitenbach, for complainant.

William E. Walsh (*George Gartner*, of counsel), for defendant.

GRANT, J. The bill in this case was filed to set aside a deed made by the complainant to the defendant, his daughter, the consideration being his future support by her. The merits of the case are not before us, no evidence being returned. The defendant has appealed from the decree rendered against her, setting aside the deed, upon the ground that the court had no jurisdiction to render it.

After the proofs had been closed and the case submitted, the circuit judge, on February 10, 1902, filed an opinion in the case, stating that the testimony was conflicting, and not very clear, and "there is a defect in the support, which could be remedied," and specified what the defect was. He then stated that the complainant had had difficulty in living with another son-in-law; that he was not entirely

[1] Rehearing denied April 10, 1903.

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without fault; and that "the decree will remain open in this case, and subject to further hearing and revision, and, if it shall turn out within 90 days or half a year that the old gentleman is misused, or hindered in his pursuit of happiness, without any fault of his own, then the matter will be further considered, and, unless he can be well used, the conveyance will be set aside."

On March 19th complainant filed a petition that the court proceed to grant him a decree. Notice of this petition and hearing thereon on March 24th was served upon the defendant's solicitor. The court could not attend to the case on that day, and no further notice was served. No answer was made to the petition. On June 12th following, a final decree, without further proofs, was entered, setting the deed aside. It is urged that the court, under these circumstances, had no jurisdiction to enter the decree.

While the proceeding was irregular, we think that the effect of the action of the court was simply to defer rendering a decree, hoping that the parties might arrange matters between them. The effect was none other or different than it would have been had he simply taken the case under advisement. No decree was actually rendered until June 12th. The decree was not inconsistent with the opinion filed, and was based upon the evidence taken before the case was submitted.

We think the court had jurisdiction to enter the decree, and it is affirmed, with costs.

The other Justices concurred.

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WREFORD *v.* CITY OF DETROIT.

MUNICIPAL CORPORATIONS—PAVING—REPAVING—ASSESSMENT.

Where, under a city charter providing that the cost of paving, but not repaving, shall be assessed upon the abutting property owners, a street, which has been paved, is paved again, including a portion of the street between the original pavement and the sidewalk, no part of the pavement can be assessed upon the owners of the adjoining property.

Appeal from Wayne; Rohnert, J. Submitted February 3, 1903. (Docket No. 65.) Decided March 5, 1903.

Bill by William Wreford and others against the city of Detroit and Thomas M. Lucking, receiver of taxes, to restrain the collection of an assessment. From a decree dismissing the bill, complainants appeal. Reversed.

Bagley avenue, in the city of Detroit, formerly known as "Macomb Avenue," in 1876 was graded and paved, with a roadway 40 feet wide, the entire cost of which was assessed upon the abutting property, which includes that of the complainants. The street was wide, and a grass plot was left between the sidewalks and the 40-feet roadway, in which were set rows of trees, which stood there for 40 years. In 1899 steps were taken to widen this roadway by about 15 feet on each side, and to repave the street the entire width of the old roadway and extensions,—about 70 feet. Contracts were let, and the entire cost of the pavement outside of the old 40-feet roadway was assessed to the adjoining owners. This bill was filed to set this assessment aside. The court dismissed the bill.

C. D. Joslyn, for complainants.

Timothy E. Tarsney and *John W. McGrath*, for defendants.

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GRANT, J. (*after stating the facts*). The only question we need to discuss is, Can the abutting property owner, having once been assessed for grading and paving the street, be again assessed for paving extensions thereof? The charter provides that "the cost of all repaving of streets shall be paid out of the repairing fund." We held in *Dickinson* v. *City of Detroit*, 111 Mich. 480 (69 N. W. 728), that a change of the roadbed from one place, within the limits of the street, to another, even though the new roadbed be much wider than the old one, did not authorize the cost of the pavement to be assessed against the abutting owners. We there reserved our opinion upon the question now presented. Counsel for both sides have evidently made diligent search, and cite no authority exactly in point. The most of the cases now cited will be found cited in *Dickinson* v. *City of Detroit*, *supra*.

The principle upon which abutting owners are charged with the expense of paving the street in the first instance is that their property is benefited by the pavement. After the improvement has once been made, its care belongs to the entire public; and it must be kept in repair and in condition, or widened or improved in any manner, by the public, and not at the expense of the owners. It is difficult to imagine what benefit accrues to abutting owners, where, as in this instance, their shade trees are cut down, the grass plots in front of their property removed, and the travel upon the street, with its dust and noise, brought nearer to their dwellings. Such improvements are clearly not for the benefit of private owners, but for the benefit of the public. We are of the opinion that when the authorities of the city laid out this street, and paved a roadway therein, suitable at the time for the use of the public, their power to assess such improvements upon abutting owners was exhausted. Where a statute required a petition of a majority of the property holders along the line of the street for the paving of a sidewalk, it was held that the sidewalk could not be widened without a new petition, because "the additional width of sidewalk for which the

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assessment was laid was a repavement." *In re Smith*, 99 N. Y. 424 (2 N. E. 52).

Decree reversed, and decree entered in this court for complainants, with the costs of both courts.

The other Justices concurred.

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LAMBTON LOAN & INVESTMENT CO. *v.* ADAMS.

LAND CONTRACTS — FORFEITURE — SUMMARY PROCEEDINGS — PAYMENT OF AMOUNT DUE—RESTITUTION.

No writ of restitution can issue upon the judgment of a circuit court commissioner for the possession of land, based upon the forfeiture of a land contract for failure to pay money due, where the defendant, within five days after final judgment, pays the amount found due, and double the amount of costs awarded. 3 Comp. Laws, § 11177.

Certiorari to St. Clair; Law, J. Submitted February 3, 1903. (Calendar No. 19,751.) Decided March 5, 1903.

Mandamus by the Lambton Loan & Investment Company to compel Charles W. Adams, circuit court commissioner of St. Clair county, to issue a writ of restitution. From an order granting the writ, respondent brings *certiorari*. Reversed.

The relator has the record and legal title to lot 13, block 23, White's plat, city of Port Huron. The lot was formerly owned by Fred J. Wright, subject to a mortgage to relator, which was foreclosed, and the lot bought in by relator, and it became owner in fee. Afterwards, October 28, 1900, the relator and said Wright entered into a contract in writing for the sale by relator and purchase by Wright of the lot, to convey upon payment of $2,443.55, in installments of $25 a month; interest semi-annually

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until principal reduced to $1,500; then deed to be given, and mortgage back for balance. Payments were made for some time, up to the amount of $350. No further payments were made up to July 9, 1902, when about $500 had become past due. In the contract is the usual provision that time shall be of the essence of the contract.

On the 9th of July, 1902, relator, by W. L. Jenks, its attorney, gave Wright notice of forfeiture of his rights under the contract by nonpayment of amount due, and demanding possession. Wright remained, and is still, in possession. December 9, 1902, relator made and filed the usual complaint to commence proceedings before the respondent, Charles W. Adams, a circuit court commissioner of St. Clair county, to regain possession under the statute in such case provided. The usual summons was issued to Wright, on the return day of which the parties appeared. Wright, the defendant therein, pleaded "Not guilty," and the case was adjourned until December 17th, when the parties again appeared and proceeded to trial, complainant relying upon the contract; and both parties agreed in open court that there was due upon said contract of purchase the sum of $2,865.65, and thereupon the commissioner ordered and adjudged that complainant have restitution, with costs, taxed at $7.83.

On December 22, 1902, and within five days after the finding and rendition of judgment as aforesaid, Wright, the defendant in that suit, paid to the commissioner, for complainant, the amount so found due and payable on the contract, with interest, and double the amount of costs, amounting in all to the sum of $2,883.68; and the commissioner offered and tendered the same to P. H. Phillips, attorney for complainant, who refused to accept the same, and it is still in the hands of the commissioner, ready to be produced and paid to said complainant or its attorney. Of the payment or manner of payment, no question is made. On the expiration of five days after the judgment, complainant's attorney demanded the issuance of a writ of restitution, which was refused. Thereupon the relator

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petitioned the circuit court for a *mandamus* to compel the commissioner to issue the writ. The court made an order that the commissioner on December 31, 1902, show cause why such *mandamus* should not issue. The commissioner made return, stating the facts without the evidence. On the day named in the order, the parties appeared, and relator demanded a further return, showing what facts appeared or were in proof. Under objection, the court ordered such further or amended return, which was made January 2, 1903, when the parties appeared, and, after argument, the court overruled respondent's objections, and entered an order that the writ of *mandamus* be issued, compelling the commissioner to issue the writ of restitution. Whereupon this writ of *certiorari* was applied for and granted.

Phillips & Jenks, for relator.

William T. Mitchell (*Stevens, Graham & Stevens*, of counsel), for respondent.

GRANT, J. (*after stating the facts*). This is a proceeding brought under the statute providing summary proceedings to recover the possession of land. Sections 11164–11181, 3 Comp. Laws. Section 11164 authorizes this proceeding when one shall "hold over any lands or tenements after the time for which they are demised or let to him, * * * or contrary to the conditions or covenants of any executory contract for the purchase of lands, * * * or where rents shall have become due on any such lease or agreement." Section 11168 provides that if it is claimed upon the trial before the commissioner, or upon appeal to the circuit court, that the complainant is entitled to possession in consequence of the nonpayment of any sum of money due as a part or portion of the purchase money of premises, the officer or the court or jury shall, in addition to the usual judgment for the complainant, ascertain and determine the amount due the complainant, and that such amount shall be stated in the judgment. Section 11177 provides

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that "no writ of restitution shall issue if the defendant shall, within five days after final judgment, pay the amount so found due, and double the amount of costs awarded to the said complainant."

Three actions were open to the complainant upon the failure of the vendee to make payments, and the service of notice upon him declaring the contract forfeited: (1) A suit in equity to foreclose the contract; (2) an action of ejectment; (3) proceedings under the statute. The first two actions exist independent of the statute. The third is purely statutory. The only violation of the vendee's contract in this case was his failure to make payments. This brought him directly within the terms of the statute. He who seeks possession for violation of a lease or contract of sale for nonpayment of money due thereunder takes the remedy subject to the conditions imposed by the statute. The statute was designed to provide a speedy and summary remedy for obtaining possession of lands held over contrary to these agreements, and in doing so it also sought to give the lessee or vendee another opportunity to retain the benefit of his contract by payments within five days, where the failure to pay was his sole default.

The judgment is reversed, and the writ of *mandamus* issued by the court below quashed.

The other Justices concurred.

MERCHANTS' EXCHANGE CO. *v.* WEISMAN.

1. SALES OF MERCHANDISE—DATE OF INVOICE.
   Where goods were sold with the privilege of exchanging them for other goods "within 15 days from date of invoice," the vendee had 15 days from the day they were shipped in which to exchange the goods.

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2. SAME—INVOICE DEFINED.

An invoice, in commercial transactions, is a written account of the particulars of merchandise shipped or sent to a purchaser, with the prices and charges annexed.

Case made from Clare; Dodds, J. Submitted February 4, 1903. (Docket No. 206.) Decided March 5, 1903.

Assumpsit by the Merchants' Exchange Company against Louis Weisman for goods sold and delivered. Plaintiff had judgment for less than the amount claimed, and assigns error. Affirmed.

This case was tried before the court without a jury, and the facts agreed upon. Defendant gave a written order, dated July 30th, to the plaintiff, for goods, the material part of which is as follows:

"Positively no goods on commission or open account.

"Guaranty and exchange: Should any jewelry sold by us fail to wear satisfactorily, the same will be duplicated free of charge for five years. Jewelry can be exchanged for any new jewelry in stock any time in twelve months from date of invoice. Solid gold jewelry at wholesale prices will be given in exchange for filled or plated jewelry at original invoice prices. Terms: Two, four, six, and eight months if account is closed within fifteen days from date of invoice by notes without interest, payable at Iowa City, Iowa. Otherwise cash less 6 per cent. in 15 days.

"Please ship goods mentioned on this order blank at your earliest convenience, and oblige."

The goods were shipped August 7th. A bill for the same—called an invoice—was dated August 2d. On August 8th plaintiff wrote defendant, informing him that the goods were shipped on the 7th inst., inclosing blank notes, should he desire to settle by giving notes, and informing him that, if he preferred to take advantage of the discount, he could do so. On August 14th defendant wrote plaintiff as follows:

"In opening up goods I find that I cannot use that class of

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jewelry. However, if you will let me keep same for about three months and see what I can do with them, and if I think that I can use it I will keep same, and if not will have to return it. I hold same here subject to your order. Kindly let me hear from you as soon as possible, and oblige.

"If you have a catalogue of jewelry, you can send me one, and if I prefer to exchange same for different kinds I can do so; as I cannot use that class of jewelry up here."

To this letter plaintiff replied August 16th, substantially refusing to comply with the defendant's letter of the 14th. To this defendant replied August 19th:

"I have selected from the amount of jewelry $69.60 worth, and return today by American Express $81.20. If you have a catalogue of jewelry you can send me one, and I will select different kinds to make up the $150 worth. I cannot use the jewelry you sent me, as it is impossible to sell it here. If you have not any catalogue, I will pay you the $69.60 as soon as I hear from you. That is the very best I can do. If this does not suit you, I will return the entire outfit."

To this plaintiff replied that the goods were shipped exactly as ordered, and that there was nothing in the contract to indicate that defendant was to have them on approval, and that plaintiff should insist on the agreement. Other correspondence followed, but it is immaterial to the issue. The court rendered a judgment for the plaintiff for $71.34, the amount admitted to be due, but found for the defendant upon the disputed amount.

Arthur J. Lacy, for appellant.

C. W. Perry, for appellee.

GRANT, J. (*after stating the facts*). Plaintiff insists that the sale was an absolute one; that payment or settlement by notes within 15 days was a condition precedent to the right to exchange the goods after the expiration of the limit; that this limit expired on August 17th; that defendant did not comply with the condition, and there-

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fore cannot maintain his defense, under *Jenness* v. *Shaw*, 35 Mich. 20.

The defendant had 15 days within which to make payment or settle the account by notes. He clearly, also, had the right to exchange at any time before the expiration of the 15 days. Plaintiff now claims that this 15-day limit began to run on the 2d of August, the date upon the face of the invoice. But the goods were not shipped until the 7th. This contract did not give plaintiff the right to antedate its invoices. An invoice, in commercial transactions, is defined to be "a written account of the particulars of merchandise shipped or sent to a purchaser, consignee, factor, etc., with the value or prices and charges annexed." Cent. Dict. & Enc.; Bouv. Law Dict. If it be conceded that the letter of August 14th was not a valid offer to return any of the goods and to exchange them for others, such valid offer was contained in the letter of the 19th, offering to return some of the goods, and asking for a catalogue from which to select other goods in exchange. This letter was written within the 15-day limit. Defendant was not then in default.

Judgment is affirmed.

The other Justices concurred.

SMALL *v.* ROBARGE.[1]

1. CONTRACT FOR SALE OF TIMBER—FORFEITURE.

Where plaintiff's testator, who had sold defendant all the cedar timber on certain lands under an agreement that it should not be cut before the pine timber, which he was cutting for another person, and that all cedar not cut before a certain date should revert to him, failed to cut the pine by the date mentioned, plaintiff could not enforce a forfeiture of the cedar standing in the pine timber.

[1] Rehearing denied April 7, 1903.

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2. SAME—NONSEVERABLE CONTRACT.
Neither could plaintiff in such case enforce a forfeiture of cedar not standing in the pine, and not cut on that date, as the right to insist on a forfeiture was not severable, and the performance of defendant's obligation was conditioned on the performance of the obligation of plaintiff's testator.

3. FORFEITURES—CONSTRUCTION.
Stipulations for forfeiture are not favored, and will be strictly construed.

Error to Cheboygan; Shepherd, J. Submitted February 4, 1903. (Docket No. 69.) Decided March 5, 1903.

Replevin by Julia A. Small, executrix of the last will and testament of Robert B. Small, deceased, against Middie E. Robarge. From a judgment for plaintiff, defendant brings error. Reversed.

Cross & Harpster and *Charles R. Henry*, for appellant.

Frost & Sprague, for appellee.

CARPENTER, J. On the 1st day of August, 1899, plaintiff's testator and defendant entered into a written contract, whereby, for the sum of $2,000, then paid, defendant purchased from said plaintiff's testator "all of the cedar timber now standing, lying, or being on" certain lands, described by their sectional location, and as "being the same land which first party [Small] is lumbering for the Cleveland Sawmill & Lumber Company." Said contract contained this provision:

"It is expressly understood and agreed by and between the parties hereto that said cedar timber shall not be cut on said land ahead of the pine timber, which is now being cut by first party [plaintiff's testator] thereon, and that said timber shall be cut before August 20, 1900, and that all timber left standing at that time shall revert to said first party."

Plaintiff's testator had purchased this standing cedar on the 31st day of July, 1899, for the sum of $600, from said

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Cleveland Sawmill & Lumber Company, by a written agreement, which was silent as to when the same was to be removed, but which obligated him "not to remove the cedar so as to endanger their white and Norway pine by fire." Said Small was lumbering said land in pursuance of a written contract made October 11, 1898, by which McIntosh & Small (a partnership composed of plaintiff's testator and one Anselm McIntosh) agreed with said Cleveland Sawmill & Lumber Company "to cut, haul, and deliver on cars * * * all of the white pine and Norway timber lying and being on" the land in question, and to complete their contract "not later than the 20th day of August, 1900." Said Robert B. Small died June 13, 1900, and consequently the work of cutting the pine timber was suspended for some time, and was not completed until April, 1901. Defendant, Robarge, did not cut all the cedar on said land before the 20th of August, 1900. He proceeded after said date and cut a large quantity, some of which was standing among the pine, and some of which, apparently, was remote therefrom. On the claim that the standing cedar reverted to plaintiff on August 20, 1900, this replevin suit was instituted, and on May 10, 1901, cedar to the value of $4,381.45 was seized under the writ. Upon the defendant's executing a bond, this cedar was returned to him. The learned trial judge in effect directed the jury to return a verdict for the plaintiff for all the cedar cut after August 20, 1900, leaving to them the question of value (which they found to be as above stated), and the question before us is whether or not this decision was correct.

The only question which we think necessary to consider is whether or not the cedar standing on said land August 20, 1900, ceased to be defendant's property, though the pine timber thereon was not yet cut. It is manifest that the contract intended to transfer to defendant the title to all the cedar standing and lying on the land. While it required him to cut the same before the 20th of August, 1900, it prohibited that cutting ahead of the pine timber,

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which, it will be noted, by the contract between plaintiff's testator and the Cleveland Sawmill & Lumber Company, was to be removed by the 20th of August, 1900. It surely was not intended that defendant should lose his cedar because plaintiff's testator defaulted in his contract to remove the pine. It is therefore clear that cedar standing on said land August 20, 1900, which, according to the contract, could not be cut, by reason of the failure of plaintiff's testator to cut the pine, did not revert to the estate of plaintiff's testator.

It is said that defendant should get no benefit from this construction, because the evidence shows that he did not regard the prohibition, but cut cedar ahead of the pine. It is a sufficient answer to this contention to say that plaintiff's right to insist upon a forfeiture must rest entirely upon the contract. No departure from the contract would enlarge that right, or give an additional right. The construction of the contract, then, and not conduct violating it, will determine whether or not defendant has forfeited his cedar.

It remains to be determined whether the cedar uncut August 20, 1900, and not standing among pine timber, reverted to the estate of plaintiff's testator. It is obvious that defendant was not prevented from cutting this cedar by the failure of plaintiff's testator to remove the pine. It is, however, to be borne in mind that stipulations for forfeiture are not favored, and are to be strictly construed. *Ortmann* v. *Bank*, 49 Mich. 56 (12 N. W. 907); *Sherlock* v. *Thayer*, 4 Mich., at page 359 (66 Am. Dec. 539); *Wilcox* v. *Allen*, 36 Mich., at page 169; *Miller* v. *Havens*, 51 Mich., at page 485 (16 N. W. 865). It is altogether equitable that this principle should apply to this case, where the estate represented by plaintiff seeks to recover $4,500 for property which cost it only $600, and for which it has already received $2,000. It is impossible to find, in the agreement upon which the rights of the parties are based, any intent that there should be several forfeitures of this timber. Nothing in the contract indi-

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cates that part of the cedar should revert at one time and part at another. As we construe the contract, the parties intended that at a certain time all cedar left standing should revert, and that until that time it belonged to defendant. While the contract expressly obligated defendant to cut the cedar by August 20, 1900, it also, by necessary implication, obligated plaintiff's testator to remove whatever pine must be removed to enable him to perform this obligation. The performance of defendant's obligation was conditioned upon the performance of the obligation of plaintiff's testator. Plaintiff could not, then, insist upon a forfeiture until the obligations resting upon her testator had been performed. We conclude, therefore, that none of the cedar reverted, so long as any of the standing pine prevented defendant, under the terms of his contract, cutting any of the cedar sold to him.

Judgment will be reversed, and a new trial ordered.

HOOKER, C. J., GRANT and MONTGOMERY, JJ., concurred. MOORE, J., did not sit.

DAYTON *v.* STAHL.

1. MORTGAGES—FORECLOSURE SALE—REDEMPTION.

Complainant was the owner of a parcel of land covered by two mortgages. The first mortgage also covered two other parcels. Both mortgages were being foreclosed. Defendant purchased the property at foreclosure sale under an agreement with complainant that if he would bid in her parcel at the sale under the second mortgage, and bid the amount of the first mortgage for the two other parcels, the money advanced by him would be repaid. *Held*, that complainant, in order to compel defendant to convey to her the parcel owned by her before the sale, must pay him not only the amount bid at the sale of her parcel under the second mortgage, but also the amount paid for the two other parcels at the sale under the first mortgage.

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2. SAME—SUBROGATION.

Upon repayment to defendant of the amount paid by him for the two parcels under said agreement at the first-mortgage sale, complainant would be subrogated to the rights acquired by him in said property.

Appeal from Ingham; Wiest, J. Submitted February 4, 1903. (Docket No. 68.) Decided March 5, 1903.

Bill by Sarah M. Dayton against Jacob Stahl to declare a deed to be a mortgage, and to redeem therefrom. From a decree dismissing the bill, complainant appeals. Affirmed.

Harry E. Hooker, for complainant.

E. C. Chapin, for defendant.

CARPENTER, J. Complainant brings this suit to obtain a decree declaring that a deed held by defendant is a mortgage, and to redeem therefrom. The case made by her bill and testimony may be stated as follows: In 1895 she owned the most northerly one of three terraces situated on the corner of Capitol avenue and Shiawassee street, in the city of Lansing. Her husband, George M. Dayton, owned the most southerly of said three terraces, and one Rolland J. Cleland owned the middle one. There was a first mortgage, securing the payment of about $7,500, covering the three terraces. There was a second mortgage for about $1,325 on each of the three terraces, held by the Lansing State Savings Bank. After the middle and south terraces had been purchased by said Lansing State Savings Bank on proceedings taken to foreclose the second mortgage, and just before a sale was to take place of the north terrace under proceedings to foreclose the second mortgage thereon, and a few days before a sale was to take place under proceedings to foreclose the first mortgage on all of said terraces, a verbal arrangement was made by complainant's husband and attorney, on her behalf, with said defendant, whereby defendant agreed to purchase at the

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foreclosure sale of the second mortgage said north terrace, and to take the title therefor in his own name, to hold the same a few days, until the money advanced by him should be repaid. It was agreed at the same time, as a part of the plan, that said defendant should attend the sale on the foreclosure of the first mortgage, which was to take place the next day after the foreclosure sale of the second mortgage on the north terrace, and bid on the south and middle terraces a sufficient amount to satisfy the entire indebtedness secured by said mortgage, with the expectation that the Lansing State Savings Bank would overbid him, take the property, and thereby leave the north terrace charged only with the amount bid at the foreclosure sale under the second mortgage. It was agreed that, if the south and middle terraces should be purchased by said defendant on his bid, he should be repaid the amount he was compelled to advance therefor, in a few days. In accordance with this arrangement, defendant purchased the north terrace at the foreclosure sale of the second mortgage for the sum of $1,325, and took the title in his own name. He attended the foreclosure sale under the first mortgage, and bid for the south and middle terraces $7,400, which was $70 less than the entire amount secured by said mortgage. Said Lansing State Savings Bank did not, however, as expected, overbid him, and he became the purchaser. He subsequently paid the $70 balance remaining unpaid on said first mortgage. Complainant asks, in this suit, a decree compelling defendant to convey to her the north terrace upon the repayment to said defendant of the $1,325 paid by him and the $70 balance, together with interest thereon. The court below dismissed her bill of complaint, and she appeals to this court.

It is unnecessary for us to decide whether the arrangement made on behalf of complainant with defendant created a mortgage, as contended by complainant, or gave to defendant an absolute title, not subject to redemption, as contended by defendant. We are agreed that, if the same constituted a mortgage, this suit cannot be main-

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tained. Under the arrangement upon which complainant relies, and in accordance with that arrangement, defendant invested $8,795 in these three terraces. Complainant seeks to redeem one of these terraces, which is not shown to be the least valuable of the three, on the payment of $1,395. She cannot take advantage of the arrangement made with defendant unless she performs the obligations which that arrangement imposed upon her property. To save her property, as she claims, defendant not only invested $1,395 therein, but he also invested $7,400 in the adjoining property. It was certainly contemplated that, if the defendant's bid on the foreclosure sale of the south and middle terraces resulted in his purchase, the north terrace would not be redeeded until he was relieved from the obligation thereby resulting. Whoever seeks to enforce a contract must enforce it according to its terms. She has no right to insist upon the benefit of one part of it, and deny the binding force of the obligations found in another part.

It is said that defendant should abide by the consequences of his purchase of the south and middle terraces, because he blundered in his bid. By this is meant, as we understand, that he at once bid a high price, instead of starting at a low figure. This was a matter committed to his discretion, and there is nothing to indicate that the Lansing State Savings Bank would have bid a larger amount had he adopted another course.

It is said that complainant cannot redeem from the purchase of the middle and south terraces, because she has no interest in that property. That is no answer. Under the claim she makes of a right to redeem from the purchase of her own property, she has a right to insist upon, and was bound to ask, a subrogation to the rights acquired by defendant in said property.

The decree of the court below must be affirmed.

GRANT and MONTGOMERY, JJ., concurred. HOOKER, C. J., and MOORE, J., did not sit.

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HYDE *v.* HAAK.

NEW TRIAL—WEIGHT OF EVIDENCE—THIRD VERDICT.

After two verdicts in favor of plaintiff have been set aside as against the weight of the evidence, the court is justified in refusing to set aside the third verdict in his favor for the same reason, where there is substantial evidence to support it. HOOKER, C. J., dissenting.

Error to Cheboygan; Shepherd, J. Submitted February 6, 1903. (Docket No. 76.) Decided March 5, 1903.

Replevin by Robert N. Hyde and others against Jacob A. Haak and others. From a judgment for plaintiffs, defendants bring error. Affirmed.

Frost & Sprague and *Charles D. Barghoorn*, for appellants.

Cross & Harpster, for appellees.

GRANT, J. This suit involves the value of 326 cedar railroad ties. Each party claims title. The title depends upon whether the ties were cut from, and through a trespass upon, the lands of the defendants, or upon other lands. If cut from the lands of the defendants, the title is in them. If cut from the other lands, the title is in the plaintiffs. There have been three trials before a jury, and each time a verdict has been rendered in favor of the plaintiffs. Twice the court below set the verdict aside, upon the motion of the defendants, on the ground that the verdict was against the weight of the evidence. After three verdicts, the court refused to grant a new trial. Defendants now ask that this action of the circuit court be reviewed.

It is unnecessary to review the testimony. There was substantial evidence in behalf of the plaintiffs. Three

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juries have believed the witnesses on the part of the plaintiffs, rather than those in behalf of the defendants. It is not contended that there is not a conflict of evidence, so that the question is a proper one for the jury. After three juries have passed upon it, we think the court below was justified in refusing a fourth trial.

Judgment affirmed.

MOORE, CARPENTER, and MONTGOMERY, JJ., concurred with GRANT, J.

HOOKER, C. J. I think that a new trial and change of venue should be granted.

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CAMPAU v. HIGHWAY COMMISSIONER OF GROSSE POINTE.

CAMPAU v. TOWNSHIP BOARD OF GROSSE POINTE.

1. CONSTITUTIONAL LAW—HIGHWAY COMMISSIONERS—STATUTES.
Act No. 303, Local Acts 1901, is not unconstitutional in abridging the functions of the highway commissioner of Grosse Pointe, a constitutional officer, as the amendment of 1899 (Const. art. 4, § 49) authorizes the legislature to modify, change, or abolish the powers and duties of the township highway commissioner.

2. MUNICIPAL CORPORATIONS—PAVING—CHANGE OF GRADE.
Under Act No. 303, Local Acts 1901, providing that, before paving a street, the town board shall declare the paving to be expedient, cause plans, specifications, and estimates of the cost to be made, submit to the electors the question of issuing bonds to defray the cost, and, with the highway commissioner, determine the details of the contract, the town board and highway commissioner may in good faith, after the election, issuing the bonds, and making the contract, change the grade of the street pavement.

Error to Wayne; Hosmer, Frazer, and Rohnert, JJ. Submitted February 25, 1903. (Docket No. 208.) Decided March 5, 1903.

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Certiorari by Daniel J. Campau to review the action of the highway commissioner and township board of Grosse Pointe in changing the grade for the macadamizing of Jefferson avenue in said township. From a judgment for plaintiff, defendants bring error. Reversed.

Appeal from Wayne; Brooke, J. Submitted February 25, 1903. (Docket No. 127.) Decided March 5, 1903.

Bill by Daniel J. Campau and others to restrain the township board and highway commissioner of Grosse Pointe, and others, from changing the grade for the macadamizing of Mack avenue. From a decree dismissing the bill, complainants appeal. Affirmed.

Thomas A. E. Weadock, for plaintiff in *certiorari*.

Orla B. Taylor, for complainants.

James H. Pound, for defendants in both cases.

MONTGOMERY, J. In the first case above entitled, the plaintiff sued out a writ of *certiorari* to review the action of the township board of Grosse Pointe and the highway commissioner in changing the grade of Jefferson avenue at a certain point, and in authorizing the macadam pavement provided for as hereinafter stated to be laid upon the highway at the changed grade. The second case is a bill in equity, filed by complainants, owners of land abutting upon either side of Mack avenue, in said township of Grosse Pointe, in which an injunction is sought to restrain the township board and the highway commissioner from departing from the original plans and specifications obtained by the board and commissioner under circumstances hereinafter recited. The history of the two cases may be given in one statement.

By Act No. 303 of the Local Acts of 1901, the township of Grosse Pointe was authorized to grade, pave, plank, gravel, macadamize, curb, and otherwise improve the highways known as "Jefferson Avenue" and "Mack

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Avenue," and to issue bonds for the purpose of defraying the expense thereof. Section 2 of the act reads as follows:

"Whenever the township board of said township of Grosse Pointe shall, by resolution duly passed, declare that it is expedient to grade, pave, plank, gravel, macadamize, curb, or otherwise improve said Jefferson avenue and Mack avenue, or either of them, the said township board and the commissioner of highways of said township, acting together, shall cause to be made plans and specifications for the improvement of such highway in the manner declared to be expedient in the resolution aforesaid, and to cause estimates to be made of the cost of such improvement or improvements. From such estimates said township board and highway commissioner, acting together, shall determine and fix the amount necessary to be raised for the purpose of such improvement or improvements, and the amount necessary to be raised by the issue and sale of bonds of said township for that purpose."

Section 3, so far as it is important, contains the following provisions:

"The township board shall then submit to the electors of said township at the annual township meeting, or at a special meeting to be called and ordered by the township board in the manner provided by law, the question of issuing bonds for the purpose of defraying the cost and expenses of the improvements declared by said township board to be expedient as aforesaid, to the amount determined by said township board and highway commissioner to be necessary therefor. The notice of such township meeting shall contain a true copy of the resolution of said township board declaring the expediency of the proposed improvement, and the manner thereof, and the amount determined by said township board and highway commissioner to be necessary for such purpose."

Section 5 provides that, after the bonds shall have been sold, and the proceeds paid into the fund, the township board and highway commissioner shall advertise for bids for furnishing the material and doing the work of making the improvement declared to be expedient, "in accordance with the plans and specifications therefor as hereinbefore provided," and shall let the contract therefor to the lowest

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responsible bidder. The successful bidder is required to give bonds for the furnishing of the material necessary and the doing of said work in accordance with said plans and specifications, and subject to the approval of said township board and commissioner of highways. The section further reads:

"The township board and commissioner of highways shall have the right to determine the details of the contract with such lowest bidder in respect of the time within which the work is to be completed, the method and time of payment, and in all other respects not hereinbefore provided for."

It appears that, after this law was enacted, the township board duly passed a resolution declaring it to be expedient to macadamize both Jefferson avenue and Mack avenue. Plans and specifications were prepared, which showed, by careful attention to the details, a grade differing in Jefferson avenue quite materially, but in the case of Mack avenue only slightly, from the grade of the highway as it was at the time the work was undertaken. This grade is only shown by a map or profile and by the use of a graduated scale, or a close examination of the figures showing the relation of the surface in the street, as proposed to be improved, to the datum line. An estimate of the cost of the proposed improvement was made, and the question of bonding for the improvement was submitted to the people. The election was held under a notice which recited that the township board had, by resolution, declared it to be expedient to improve these streets; and also recited that plans and specifications had been drawn, and were on file with the clerk; that estimates had been made, showing the cost to be $165,000; and stating the form of the ballot, etc. Contracts were entered into, and the work entered upon.

The board and highway commissioner, acting together, thereafter determined that a change in the grade as shown by the profile on Mack avenue, making the general level from five to seven inches higher than as shown, was desirable, and a somewhat more substantial change in the grade

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of Jefferson avenue was also determined to be desirable. The complainants in the chancery suit claim that such change as to Mack avenue damages their property by leaving it below the surface of the highway, requiring expensive filling. It is also claimed in the *certiorari* case that the change of grade of Jefferson avenue would prove injurious to the plaintiff's property.

One question is made in the *certiorari* case which is not presented by the chancery record, but which is important to both cases, viz., whether the law is unconstitutional. It is contended that it is, and for the reason that it withdraws from the highway commissioner his functions, and that, as he is a constitutional officer, this cannot be done. Without expressing any view as to the validity of this act under the Constitution as it stood prior to the amendment of 1899 (section 49, art. 4), we think that section is a sufficient and complete answer to the plaintiff's contention. It provides that the legislature may provide for the laying out, construction, improvement, and maintenance of highways, bridges, and culverts by counties and townships, and may authorize counties to take charge of any highways within their limits for such purposes, and may modify, change, or abolish the powers and duties of township commissioners and overseers of highways. Language could not well be more plain, and we think it cannot be said that this constitutional amendment was intended exclusively to provide for a county road system. This may have been the prime object, but it in terms confers upon the legislature authority to provide for the laying out and maintenance of highways by townships as well as counties, and gives the broadest power to modify or abolish the powers and duties of township commissioners and overseers of highways.

The meritorious question, which is common to both cases, is whether the authority of the township board and highway commissioner is limited to constructing the highway in precise accord with the terms of the preliminary specifications and plans. The argument is made that the

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purpose of this act is to give the people the right to determine and pass upon the specifications, and that, having done so, the highway commissioner and township board become simply agents to carry into effect the expressed will of the people at the election.

It is to be noted that by section 2 the township board, in the first instance, is authorized to declare the improvement of the highway by paving, planking, graveling, macadamizing, etc., to be expedient. It is true that this is followed by a provision in the section that, after this is done, the board and highway commissioner shall cause plans and specifications to be made, and estimates of the cost of the improvement; and it is also provided that from these estimates they shall determine and fix the amount necessary to be raised for the purpose of the improvement. But by section 3 the board is required to submit to the electors the question of issuing bonds for the purpose of defraying the cost and expenses of the improvement *declared by the township board to be expedient as aforesaid*, to the amount determined by the township board and highway commissioner to be necessary therefor. A significant thing, also, is the notice which is required. This notice is required to contain a true copy of the resolution declaring the expediency of the proposed improvement, and the *manner thereof*, and the amount determined by said township board and highway commissioner to be necessary for such purpose. The resolution declaring the improvement and the *manner thereof*, it will be noted, preceded the joint action of the commissioner and township board, and therefore "the manner thereof," as here used, must relate to the manner as macadamizing, or graveling, or paving, rather than to the manner in detail as subsequently ascertained; for the resolution, preceding, as it does, such specifications and plans, cannot, in the nature of things, refer to them or include them. All that is further required is a statement of the amount determined to be necessary for this purpose. We think it clear, therefore, that it was not the intention that the

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electors should pass upon the details of the plans and specifications, but that the question submitted to them should be the broad question of paving, macadamizing, etc., and the raising of a definite sum of money, ascertained or estimated in a manner prescribed by the statute. The question whether the hands of the board and commissioner were to be tied by these specifications and plans may be considered divorced from any thought that they are merely agents to register the will of the people in the matter of making a contract.

This does not avoid the whole difficulty, for it is provided by section 5 that the board and commissioner shall advertise for bids in accordance with the plans and specifications theretofore adopted. It is also provided that the bonds shall be to perform the work according to the plans and specifications, and subject to the approval of the township board and commissioner of highways. And it is provided that the board and commissioner "shall have the right to determine the details of the contract with such lowest bidder in respect of the time within which the work is to be completed, the method and time of payment, and in all other respects not hereinbefore provided for." The question is, May such changes as a change in the grade of the highway be made, so long as good faith is exercised, and so long as the officials keep within the limit of expenditure fixed by the people? We think this question should be answered in the affirmative. Any other construction of this statute would result in this: That any slight mistake or error in the original plans and specifications could not be corrected. An error once made is an error for all time. It is true it is urged that the board and commissioner, upon ascertaining that the plans and specifications were defective, might pause, and do nothing. The statute does not contemplate this. It is as imperative that they shall advertise for bids and proceed with the work as it is in any other part.

It was suggested by the circuit judges who wrote the opinion in the *certiorari* case that, if there is a real neces-

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sity for a radical departure from the plan under consideration at the time of issuing bonds, there must be power in the people to accept and authorize such change, but that without their assent there is no authority to make a material alteration. But the act contains no provision for a second submission of the question, and, as we have pointed out, it is not in contemplation of the act that each individual voter should pass upon the details of the plans and specifications, with a graduated rule or otherwise. The act does not provide for submitting these plans and specifications to the voters. It is doubtful whether the plans and specifications provided for by this statute related to the subject of grade at all. At all events, we are of the opinion that, under the authority of section 5, the board and commissioner, acting in good faith, may, in determining the details of the contract, provide that the highway shall conform to the grade which shall to them seem most practicable.

It follows from these views that the decree in the chancery case should be affirmed, and the judgment in the law case should be reversed, with costs in each instance to the prevailing party.

HOOKER, C. J., CARPENTER and GRANT, JJ., concurred. MOORE, J., did not sit.

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McDONALD *v.* MICHIGAN CENTRAL RAILROAD CO.[1]

1. RAILROADS—CAR INSPECTOR—CONDUCTOR—FELLOW-SERVANTS. A car inspector whose duty it is to supply safe machinery is not a fellow-servant of a freight conductor whose duty it is to operate the machinery.[2]

[1] Rehearing denied March 23, 1903.

[2] As to what servants are deemed to be in the same common employment, apart from statutes, where no question as to vice-principalship arises, see note to *Sofield* v. *Smelting Co.*, (N. J.) 50 L. R. A. 417.

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2. SAME—RULES OF COMPANY—NEGLIGENCE.

The conductor of a freight train tested the brakes on a car in the usual way, by setting and releasing them, before he started his train in the morning. At the third station from where the company's inspector examined the car, the conductor applied the brakes, when something gave way, and he was thrown under the car and injured. It appeared that the chain attached to the brake-mast below the platform had before that time parted, and been repaired with hay wire, which gave way under the strain. *Held*, that the conductor had neglected no duty imposed upon him by a rule requiring him to know that there was a reliable brake on the car.

Error to Gladwin; Sharpe, J. Submitted November 21, 1902. (Docket No. 111.) Decided March 6, 1903.

Case by Joseph D. McDonald against the Michigan Central Railroad Company for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

O. E. Butterfield (*Henry Russel*, of counsel), for appellant.

De Vere Hall, for appellee, cited the following cases, in addition to those given in the opinion:

Swoboda v. *Ward*, 40 Mich. 420; *Tangney* v. *J. B. Wilson & Co.*, 87 Mich. 453 (49 N. W. 666); *Ashman* v. *Railroad Co.*, 90 Mich. 571 (51 N. W. 645); *Balhoff* v. *Railroad Co.*, 106 Mich. 612 (65 N. W. 592); *Anderson* v. *Railroad Co.*, 107 Mich. 591 (65 N. W. 585); *Woods* v. *Railway Co.*, 108 Mich. 396 (66 N. W. 328); *Fones* v. *Phillips*, 39 Ark. 17 (43 Am. Rep. 264); *Daves* v. *Railroad Co.*, 98 Cal. 20 (32 Pac. 708, 35 Am. St. Rep. 133); *Denver Tramway Co.* v. *Crumbaugh*, 23 Colo. 363 (48 Pac. 503); *McElligott* v. *Randolph*, 61 Conn. 157 (22 Atl. 1094, 29 Am. St. Rep. 181); *Baltimore, etc., R. Co.* v. *Elliott*, 9 App. D. C. 341; *Chicago, etc., R. Co.* v. *Kneirim*, 152 Ill. 458 (39 N. E. 324, 43 Am. St. Rep. 259); *Cincinnati, etc., R. Co.* v. *McMullen*, 117 Ind. 439 (20 N. E. 287, 10 Am. St. Rep. 67); *Brann* v. *Railroad Co.*, 53 Iowa, 595 (6 N. W. 5, 36 Am. Rep. 243); *Atchison, etc., R. Co.* v. *Moore*, 29 Kan. 644; *Shanny* v. *Androscoggin Mills*, 66 Me. 420; *Tierney* v. *Railway*

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Co., 33 Minn. 311 (23 N. W. 229, 53 Am. Rep. 35); *Coontz* v. *Railway Co.*, 121 Mo. 652 (26 S. W. 661); *Chicago, etc., R. Co.* v. *Kellogg*, 54 Neb. 127 (74 N. W. 454); *Jaques* v. *Manufacturing Co.*, 66 N. H. 482 (22 Atl. 552, 13 L. R. A. 824); *Flike* v. *Railroad Co.*, 53 N. Y. 549 (13 Am. Rep. 545); *Chesson* v. *Lumber Co.*, 118 N. C. 59 (23 S. E. 925); *Cameron* v. *Railway Co.*, 8 N. Dak. 124 (77 N. W. 1016); *Anderson* v. *Bennett*, 16 Or. 515 (19 Pac. 765, 8 Am. St. Rep. 311); *Mulvey* v. *Locomotive Works*, 14 R. I. 204; *Carter* v. *Oil Co.*, 34 S. C. 211 (13 S. E. 419, 27 Am. St. Rep. 815); *H. & T. C. R. Co.* v. *Marcelles*, 59 Tex. 334; *Gardner* v. *Railroad Co.*, 150 U. S. 360 (14 Sup. Ct. 140); *Davis* v. *Railroad Co.*, 55 Vt. 84 (45 Am. Rep. 590); *Moon's Adm'r* v. *Railroad Co.*, 78 Va. 745 (49 Am. Rep. 401); *Ogle* v. *Jones*, 16 Wash. 319 (47 Pac. 747); *Cooper* v. *Railway Co.*, 24 W. Va. 37; *Brabbits* v. *Railway Co.*, 38 Wis. 289.

MOORE, J. The plaintiff recovered a judgment against the defendant for injuries received by him while in its employ. The case is brought here by writ of error.

The plaintiff was in charge of a freight train running from Grayling to Mackinaw City. Grayling is about half way between Bay City and Mackinaw City. The defendant maintains a car repair shop at Bay City. At Grayling it has a train-master and four car inspectors or repairers. At Mackinaw City it has one car inspector or repairer. The inspectors or repairers at Mackinaw City and Grayling inspect the cars, and repair such broken or defective parts as they are able to with the appliances at hand, which are not sufficient to enable them to do any welding. If the repairs are of such a character as to require it, the cars are sent to the shop at Bay City.

While in charge of his train in September, 1901, as it approached the third or fourth station north from Grayling, the plaintiff attempted to set the brake upon the way-car. Something gave way. The plaintiff was thrown between the way-car and the car next front of it. The wheels of the way-car passed over him, injuring him severely. An examination after the injury showed that

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the chain attached to the lower part of the brake-mast had before that parted, and been repaired by using a wire, which was supposed to have been hay wire. This wire gave way under the strain, and hence the accident. This accident occurred upon the second round trip of the way-car after it left the repair shop at Bay City. It does not appear when or by whom the hay wire was used to repair the chain. It is claimed by defendant the car was in good repair when it left the shop at Bay City. This is not admitted by plaintiff. Mr. Trumley, the inspector at Grayling, who claims he inspected the car at that place, was a witness on the part of the defendant, and disclaimed all knowledge of the wire. The inspector from Mackinaw City was not produced as a witness.

Counsel for defendant say there are two questions presented by the record:

1. The liability of a railroad company to a freight conductor injured by the negligence of a car inspector, whose duty it was to inspect and repair the way-car.
2. The right of such a conductor to recover for injuries resulting from an unreliable brake upon a way-car, when, by a rule of the company, he was "required to know that there was a reliable brake" on the car before making use of it.

As to the first of these questions, the position of the defendant is shown by the following statements taken from the brief of counsel:

"The duty of the company is:
"(1) To provide a reasonably safe place and reasonably safe appliances.
"(2) To use reasonable care to maintain place and appliances in a reasonably safe condition."

It is said the car was reasonably safe when it left the shop at Bay City. In regard to the duty of the company to maintain it in a reasonably safe condition, it is said:

"It performs the duty by employing a competent servant to inspect and repair defects when they appear; and, before it can be held liable for injuries resulting from

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defects arising in the course of operation, it must have notice, either actual or constructive, that the defect exists, or that the servant is not performing the work assigned to him with reasonable care. In other words, there must be evidence that the master is not exercising reasonable supervision over his servants to see that they perform their work with reasonable care. There is no delegation of duty. It is performance. It is an exercise of reasonable care to maintain the appliance in a reasonably safe condition."

Again:

"The company furnishes this way-car to its Grayling-Mackinaw division. It has a number of employés who are to make use of the car, some to inspect it, some to ride upon it, and some to set its brakes. The man who is to inspect it fails in his work. The company has no means of knowing what moment an employé, hitherto trusty and reliable, will prove deficient. But it has exercised reasonable care to preserve the reasonably safe condition of this way-car while it is in use by the employés of that division, by employing competent men to inspect the car at the end of every trip. Unless the plaintiff is able to show that the company knew of the existence of the defect, or that it had existed for a sufficient length of time to impose upon the company the duty to know, he cannot recover. This is the full measure of the defendant's duty to the plaintiff in this case, and we submit it is not shown to have neglected that duty."

Counsel cite cases which it is claimed sustain this contention.

It is the claim of plaintiff that the duty resting on defendant is not discharged by furnishing safe cars in the first instance; that such duty of maintenance is a continuing one, which it discharges through the employment of inspectors and repairers, and that the latter must exercise reasonable watchfulness and care to maintain such cars in a reasonably safe condition; and that defendant is liable for any omission of duty in that regard on the part of such inspectors or repairers, where, as a proximate cause of such omission, injury results to plaintiff, as one using such car.

It must be conceded the authorities are not agreed, but

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the principles involved are not new in this State. The difficulty lies in the application of them to a given case. In *Morton* v. *Railroad Co.*, 81 Mich. 423 (46 N. W. 111), Justice CAHILL, speaking for the court, said:

"The rule may now be considered settled in this State, as well as in most of the States, not only that a master is bound to use all reasonable care in providing safe tools and appliances for the use of workmen in his employ, but that this is a duty which cannot be delegated to another so as to relieve him from personal responsibility. *Johnson* v. *Spear*, 76 Mich. 139 (42 N. W. 1092, 15 Am. St. Rep. 298); *Van Dusen* v. *Letellier*, 78 Mich. 492 (44 N. W. 572); *Brown* v. *Gilchrist*, 80 Mich. 56 (45 N. W. 82, 20 Am. St. Rep. 496).

"The duty of the master to his employé in this respect is clearly and well stated by Mr. Justice MORSE in *Van Dusen* v. *Letellier*, just cited, at page 502:

"'It is well settled by all the authorities that the master must provide his servant with a safe place to work in, and furnish him with suitable machinery and appliances with which to perform such work, and it is his duty to keep such machinery and appliances in good repair. If he cannot do this himself personally, he must provide some other person to take his place in this respect; and the person to whom the master's duty is thus delegated—no matter what his rank or grade; no matter by what name he may be designated—cannot be a servant in the sense or under the rule applicable to injuries occasioned by fellow-servants. Such person is an agent, and the rules of law applicable to principal and agent must apply.'

"This doctrine is also clearly stated by Justice Field in *Northern Pacific R. Co.* v. *Herbert*, 116 U. S. 650 (6 Sup. Ct. 594), where the whole question is carefully discussed, and numerous authorities in New York, Massachusetts, Maine, and other States to the same effect discussed and approved. Four of the judges dissented from his opinion, upon the ground that the case was governed by a special statute in Dakota, but expressed no opinion as to the common-law liability of the defendant under the circumstances of that case.

"In 1 Shear. & R. Neg. (4th Ed.) §§ 194, 204, this question is discussed and stated as follows:

"'SEC. 194. The master also personally owes to his servants the duty of using ordinary care and diligence to provide for their use

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in his service sound and safe materials, instruments, and accommodations, and such appliances as are reasonably calculated to insure their safety. He is also personally bound to inspect and examine all these things from time to time, and to use ordinary care and skill to discover and repair defects in them.'

" 'SEC. 204. None of the duties which have been previously stated as devolving upon the master personally can be by him delegated to any agent so as to relieve him from personal responsibility. He may, and often must, delegate the performance of such duties to subordinates; but he remains responsible to all his servants for the acts of these subordinates in that particular capacity, to the same extent as if those acts were literally his own.'

"The doctrine of the text is ably supported by the citation of authorities."

This case is cited with approval in *Sadowski* v. *Car Co.*, 84 Mich. 100 (47 N. W. 598). After quoting from the case cited and from the argument of counsel, the learned justice said:

"But the ingenious reasoning of counsel fails to take account of an important limitation upon the rule which relieves a master from liability when a servant is injured through the fault of another. That doctrine was never applied unless the one injured and the one at fault were engaged in the same general employment. Whatever conflict has arisen in cases has been as to what should be considered the same general employment. The rule adopted by the Federal courts, and in most of the States, and which seems to us most in consonance with reason and humanity, is that those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools for labor, are engaged in a different employment from those who are to use the place or appliances when provided, and they are not, therefore, as to each other, fellow-servants. In such case, the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence.

" In *Ford* v. *Railroad Co.*, 110 Mass. 240 (14 Am. Rep. 598), it was said:

" 'The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating

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it. They are charged with a master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require.'

"In *Northern Pacific R. Co.* v. *Herbert*, 116 U. S. 653 (6 Sup. Ct. 596), Mr. Justice Field, speaking of the distinction that he found to exist between the providing of safe machinery and the business of handling and moving it, said:

" 'The two kinds of business are as distinct as the making and repairing of a carriage is from the running of it.' "

The case of *Sadowski* v. *Car Co.* was cited and quoted from in *Roux* v. *Lumber Co.*, 94 Mich. 607 (54 N. W. 492). The fact is well recognized that there is a difference between the duty of furnishing a safe place or safe appliance to the employé, and the duty of seeing that the place or appliance so furnished is properly used.

In *McDonald* v. *Railroad Co.*, 108 Mich. 7 (65 N. W. 597), Justice MONTGOMERY, speaking for the majority of the court, said:

"The duty which the master owes to provide a reasonably safe place to work, and machinery in a reasonably safe condition, is not discharged for all time by providing machinery or premises safe in the first instance. *Van Dusen* v. *Letellier*, 78 Mich. 492 (44 N. W. 572). This duty cannot be discharged by providing for an inspection by a fellow-servant, for wherever the duty of inspection, for the purpose of ascertaining whether there be a necessity to repair, or whether the machinery is in safe condition, exists, it is the master's duty. The duty of diligence in maintaining the machinery in a reasonably safe condition necessarily involves the duty of the master to take such reasonable measures to inform himself from time to time of the condition of the machinery as common prudence dictates."

And such we understand is the law. See the many cases cited in the brief of counsel for the plaintiff.

We now come to the consideration of the second question: Does the enactment of rule 50 relieve the defendant

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of liability? The material parts of the rule read as follows:

"Conductors must know at all times that their train is provided with everything necessary to enable them to comply with the regulations of the road. They are required to know that there is a reliable brake on the rear car, and that a proper man is kept at it while the train is in motion."

It is the claim of defendant that the rule imposed upon the plaintiff the risk of all dangers discernible by a prudent inspection, and that the defect was easily discernible; counsel citing *Brennan* v. *Railroad Co.*, 93 Mich. 156 (53 N. W. 358); *Enright* v. *Railway Co.*, 93 Mich. 412 (53 N. W. 536); *Whalen* v. *Railroad Co.*, 114 Mich. 524 (72 N. W. 323); *Peppett* v. *Railroad Co.*, 119 Mich. 640 (78 N. W. 900). An examination of these cases will show they are easily distinguishable from the one at bar. In the first case plaintiff knew of the dangers which it was claimed constituted negligence, and he also violated a rule of the company of which he had notice, which forbade him to do the thing he did. In the second case the plaintiff was hurt because of the negligence of a fellow-servant who was violating the positive requirements of a rule. In the third case the plaintiff was violating the requirements of a positive rule. In the last case cited, the following is stated in the opinion of the court:

"The following facts are established by the evidence
"1. That the engine was properly constructed.
"2. That defendant had performed its full duty as to inspection.
"3. It was the duty of the decedent, both after coming in and before going out, to inspect the engine, and, after coming in, to minute in a book, kept for that purpose, any repair needed. He did make such inspection, but reported nothing wrong. The wearing, if any there was, was easily discernible. He therefore assumed the risk of such defect."

It is hardly believable that, if the inspector at Grayling had made the inspection which it was his duty to

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make, the defect in the chain would have escaped his observation. It would have been easy for the framer of the rule to have said, in so many words, that the conductor should inspect the brake, if the company intended to impose that duty upon him. The plaintiff testified that, before he started his train out in the morning, he tried the brakes at each end of the car in the usual and customary way, by setting them up and releasing them, and that they worked properly. It is manifest this was not such a severe test as the chain would be subjected to in an effort to stop a running train on a down grade. It also appears that that portion of the brake-mast around which the chain winds was below the platform of the car, and, as the chain wound around it, the wire would be concealed. There is nothing in the record to show that plaintiff neglected any duty imposed upon him by the rule. See *Lake Shore, etc., R. Co.* v. *Parker*, 131 Ill. 557 (23 N. E. 237). The case was carefully tried and properly submitted to the jury.

Judgment is affirmed.

HOOKER, C. J., CARPENTER and MONTGOMERY, JJ., concurred. GRANT, J., took no part in the decision.

McALLISTER v. DES ROCHERS.

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1. MECHANICS' LIENS—ASSIGNMENTS.
   3 Comp. Laws, § 10734, does not require a laborer or materialman to make and file a statement of his claim of lien before it is assignable.

2. SAME—ERROR IN STATEMENT—FORFEITURE.
   A clerical error in filing the statement of a lien, made in the honest belief that it is correct, will not subject the laborer or materialman to a forfeiture of his claim.

3. SAME—HOMESTEAD—CONTRACT NOT SIGNED BY WIFE.
   Where a parcel of land occupied as a homestead is worth more

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than $1,500; the excess over $1,500 is liable for a laborer's lien under 3 Comp. Laws, § 10711, although the building contract is not signed by both husband and wife. MONTGOMERY and MOORE, JJ., dissenting.

4. SAME—EVIDENCE OF VALUE.

Where the testimony in a suit to foreclose certain liens upon a homestead shows that the house was substantially completed at the time the liens were filed, the value of the lot, the contract price of the house, the fact that it was taken too low, and that there were some extras, there is some evidence of the value of the property at the time the liens attached. MONTGOMERY and MOORE, JJ., dissenting.

Appeal from Houghton; Streeter, J. Submitted December 13, 1901. (Docket No. 189.) Reargued January 14, 1903. (Docket No. 38.) Decided March 9, 1903.

Bill by Hector McAllister against Edward Des Rochers and others to enforce a mechanic's lien. Defendants John Funkey, Sr., the Portage Lake Hardware Company, Limited, and David McIntyre filed separate cross-bills to foreclose similar liens. From a decree dismissing the several bills, the lien claimants appeal. Reversed.

Complainant was a laborer, and performed work upon a house erected upon a lot of defendant Des Rochers. Four other laborers assigned their claims to him before proceedings were commenced to enforce a lien. The other defendants filed separate cross-bills in the suit, to foreclose their liens on the same premises. Des Rochers let a contract for the erection of the building, but it was not signed by his wife. There was evidence showing that the lot was worth $450. The contract price for the construction of the building was $1,800, and there were claims for extras. The total amount of the liens was $575.83. The court below dismissed the bills for the reason that the premises constituted a homestead, and the liens could not be enforced because the wife had not signed the contract.

Dunstan & Hanchette, for appellants.

Chadbourne & Rees, for defendant Des Rochers.

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GRANT, J. (*after stating the facts*). 1. The first question urged by the defendant Des Rochers is that under the statute, until a statement is filed as provided therein, there is no lien or claim of lien which can be assigned under 3 Comp. Laws, § 10734. We think this too narrow a construction to be placed upon the statute. It provides that "all liens or claims for liens which may arise or accrue under the terms of this act shall be assignable, and proceedings to enforce such liens may be maintained by and in the name of the assignees." The purpose of this statute was to permit those who furnished labor and material in the construction of the building to assign their claims, so that one proceeding in the interest of economy should suffice. The statute does not require that the laborer or the materialman must first make and file a statement of his claim before he has an assignable claim.

2. Cross-complainant Funkey filed a claim for $271.41, whereas in fact there was due him only $217.41. Mr. Funkey at no time claimed more than $217.41. In filing the claim a clerical error was evidently made in the transposition of the figures,—a mistake not uncommon, even in briefs of counsel in the citation of authorities. The agent of the Portage Lake Hardware Company filed a claim of $110.68, whereas in fact only $88.96 was due. The error arose in charging up to the contractor some registers which were not used in Des Rochers' house. They appear to have been entered upon the books, but were not stricken out, or the account credited with them, when the affidavit was filed. We think there was no evidence of bad faith, or such carelessness as to bring the case within the rule in *Gibbs* v. *Hanchette*, 90 Mich. 657 (51 N. W. 691).

3. Can a mechanic's lien be enforced upon premises constituting a homestead, the value of which is in excess of $1,500? The answer depends upon the construction to be placed upon the statute (3 Comp. Laws, § 10711), which reads as follows:

"In case the title to such lands upon which improvements are made is held by husband and wife jointly, or in

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case the lands upon which such improvements are made are held and occupied as a homestead, the lien given by this act shall attach to such lands and improvements if the improvements be made in pursuance of a contract in writing signed by both the husband and wife."

Does the word "homestead," as used in the statute, mean the house, buildings, and premises occupied by the householder and his family as their home, without regard to value, or is it used in the more restricted sense of an exemption, as used in the Constitution? "Homestead," defined by the Constitution, does not mean the homestead as used in its popular sense, or as used in other branches of the law. One of its descriptions is its value, to wit, $1,500. Beyond that value it is not exempt. It was, therefore, early held by this court that where the homestead provided by the Constitution exceeds in value $1,500, and is indivisible, legislation was necessary in order to secure this exemption to a debtor, and that without such legislation no homestead exists in favor of the family. *Beecher* v. *Baldy*, 7 Mich. 488; *Zoellner* v. *Zoellner*, 53 Mich. 626 (19 N. W. 556). Subsequently, to meet this decision, the legislature provided for a determination of the value of the premises occupied as a homestead, and securing to the debtor $1,500. 3 Comp. Laws, § 10369. Under this act an appraisal is to be made when an officer has an execution or a decree to enforce against the homesteader. If the appraisal exceeds $1,500, the householder must pay the excess over and above that amount, or the amount due on such execution or decree, within 60 days. If he does not do this, the premises may be sold. A mechanic's lien was held enforceable under the above statute, although the lien law made no provision for a lien upon a homestead. *Lamont* v. *Le Fevre*, 96 Mich. 175 (55 N. W. 687). Mortgages and deeds not signed by the wife, though void as to the homestead, are valid as to the excess over and above the homestead. *Dye* v. *Mann*, 10 Mich. 291; *Wallace* v. *Harris*, 32 Mich. 380. This holding applies only to cases where the premises are divisible. A mort-

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gage for the purchase price is valid without the wife's signature. *Amphlett* v. *Hibbard*, 29 Mich. 298.

We think the legislature in this act used the word "homestead," not in its broad and popular definition, but in its restricted definition as used in the Constitution. The purpose was not to exempt the premises used for the family as a home from the operation of the lien law so as to protect premises worth, perhaps, $50,000 or more, but to protect the homestead provided for in the Constitution. Counsel say that laborers and materialmen might protect themselves by ascertaining whether the contract is signed by the wife. So they might do this where no lien is provided for; and, if such men had always been thoughtful and careful enough to so protect their interests, there would have been no necessity for any lien law. Under the construction contended for by defendant Des Rochers, the lien law would be valueless in a large part of the transactions in which laborers and materialmen are engaged. We think the learned circuit judge erred in the conclusion reached.

4. Counsel for defendant contend—citing *Mills* v. *Hobbs*, 76 Mich. 122 (42 N. W. 1084)—that the value of the premises at the time the lien attaches controls, and that there is no evidence in this case of the value at that time. The testimony shows that the house was substantially, if not entirely, completed at the time the liens were filed. This appears from the fact that Mr. McIntyre, who had the contract for painting and finishing the house, for which he was to receive $100, with certain extra charges, had nearly completed his work, when Des Rochers refused to let him finish it. The value of the lot, the contract price for erecting the building, the extras furnished, and the testimony that the contract was taken at too low a figure, are some evidence of the value of the property; and upon this basis it is worth the full amount of the liens over and above the homestead exemption. When proceedings are taken under the decree of foreclosure, steps must be taken under section 10369, above

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cited, and the interests of the defendant in this regard can then be fully disposed of.

Decree reversed, and decree entered for the complainant and cross-complainants, with the costs of both courts.

HOOKER, C. J., and CARPENTER, J., concurred with GRANT, J.

MONTGOMERY, J. (*dissenting*). I cannot agree with my Brother GRANT in his conclusion in this case. It cannot be doubted that the legislative declaration in 3 Comp. Laws, § 10711, that a lien shall attach to a homestead for improvements made upon the property under certain conditions, excludes a lien in all other cases. It is required, then, that, before a lien shall attach "in case the lands upon which the improvements are made are held and occupied as a homestead," there shall be a contract in writing, signed by both husband and wife. That the premises in this case were so used and occupied within the meaning of the statutes relating to homesteads appears not to be questioned. But a construction of the word "homestead" is adopted which, it seems to me, is entirely untenable. If it is true that the word "homestead," used in this sentence, means a homestead not exceeding in value $1,500, then it logically follows that no writing is required in such case, and the lien attaches to the whole property, not to the excess over $1,500, for the only requirement of writing is as to property held and occupied as a homestead. If, on the other hand, this property is in fact held and occupied as a homestead, then, unless we ignore the plain language of the statute, no lien can attach unless the contract therefor be in writing. This construction of the term "homestead" is plainly that which has been adopted by the legislature. If we turn to 3 Comp. Laws, § 10362, we find the legislature declaring that:

"A homestead, consisting of any quantity of land not exceeding forty acres, and the dwelling house thereon and its appurtenances, to be selected by the owner thereof, and

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not included in any recorded town plat, * * * shall not be subject to forced sale on execution."

If this section stood alone, it is very clear that the value of the exempted property would not affect the right of exemption. It is only by virtue of other provisions of the act, namely, section 10369, that the limit of $1,500 is fixed, by authorizing a proceeding under which the excess in value over $1,500 may be reached. The statute in this case (3 Comp. Laws, § 10711) contains no such provision. The lien does not attach in any case to lands held and occupied as a homestead, unless the contract be in writing.

There is another difficulty that confronts the complainant in the present case, as it seems to me. This record fails to show what the value of the premises was at the time the lien attached. By this I do not mean at the time the claim of lien was filed, but at the time when the work was done.

In my opinion, the decree should be affirmed.

MOORE, J., concurred with MONTGOMERY, J.

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GUSTAFSON v. EGER.

1. WITNESSES—COMPETENCY—ESTATES OF DECEDENTS—AGENT IN MAKING CONTRACT—SET-OFF.

Where an administrator brought suit upon a promissory note, testimony by defendant's husband in her behalf, to prove a set-off by sales of merchandise made for her by him, showed that he acted as her agent in making a contract involved in the suit, and was therefore inadmissible. Act No. 239, Pub. Acts 1901.

2. SAME—PAYMENTS.

If such sales were made under an arrangement that they should be treated as payments upon the note, each payment involved a contract of purchase, and an agreement that the price

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should apply as payment, and the evidence was therefore inadmissible.

MOORE and GRANT, JJ., dissenting.

Error to Marquette; Stone, J. Submitted April 22, 1902. (Docket No. 101.) Reargued February 6, 1903. (Docket No. 35.) Decided March 9, 1903.

Assumpsit by Frank Gustafson, administrator, with the will annexed, of the estate of Augusta D. Gustafson, deceased, against Mary A. Eger, upon a promissory note. From a judgment for defendant, plaintiff brings error. Reversed.

Ball & Ball, for appellant.

Clark & Pearl, for appellee.

HOOKER, C. J. The defendant and her mother were tenants in common of a stock of jewelry. The defendant purchased her mother's interest, giving four notes in payment. Three of the notes were paid, and this action was brought upon the last to fall due. No controversy arises over the giving of the note. The defense made is by way of payment and set-off. After purchasing the property, the defendant conducted a jewelry business; her husband being manager and agent for her in the conduct of the business. Upon the trial he was permitted to testify that he sold to the mother articles of jewelry from the store. This testimony was objected to upon the ground that he was disqualified as a witness, for the reason that the mother was dead, under the statute (3 Comp. Laws, § 10212, as amended by Act No. 239 of the Public Acts of 1901), which provides:

"When a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased

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person; and when any suit or proceeding is prosecuted or defended by any surviving partner or partners, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of the deceased partner, and not within the knowledge of any one of the surviving partners. No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died shall be a competent witness, in any suit involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract, against the legal representatives or heirs of such decedent, unless he shall be called by such heirs or legal representatives. And when any suit or proceeding is prosecuted or defended by any corporation, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation, and not within the knowledge of any surviving officer or agent of the corporation; nor, when any suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person against a corporation (or its assigns), shall any person who is or has been an officer or agent of any such corporation be allowed to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person: *Provided*, that whenever the words 'the opposite party' occur in this section it shall be deemed to include the assignors or assignees of the claim, or any part thereof, in controversy. *And provided* further, that whenever the deposition, affidavit, or testimony of such deceased party, taken in his lifetime, shall be read in evidence in such suit or proceeding, that the affidavit or testimony of the surviving party shall be admitted in his own behalf on all matters mentioned or covered in such deposition, affidavit, or testimony."

It is urged on behalf of the defendant that this testimony is not within the prohibition of the statute, because the husband had nothing to do with the original purchase by his wife of the jewelry. That contract was executed when the notes were given. It is now proposed to defend against the notes by showing a set-off. Every set-off involves a

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contract. In this case a contract was made between the parties to this suit whenever the mother purchased any article of jewelry which is now made the subject of set-off. She purchased them through the husband and agent of the defendant. These are as much contracts, within the terms of the statute, as any other contract.

The husband was also allowed to testify that at some time he heard the mother state that she intended to purchase "quite a good deal of goods out of the store, and that the goods so purchased should apply upon this last note." It may be that it is inferable from the testimony that this was said at the time the original contract was made, but we do not discover that this should make any difference. In the first place, it is doubtful if it can be called a part of the original contract, for the reason that there is nothing definite or certain about it. It created no obligation that could be enforced. The mother was at liberty to purchase jewelry, or not, as she chose; and, had she refused to do so, no action for breach of contract could have been maintained.

The effect is not different if it be said that the jewelry purchased under the arrangement is not to be treated as a set-off, but payment, for the reason that such payment involved a contract of purchase, and an agreement, either previous or subsequent, that the price should apply as a payment.

The judgment should be reversed, and a new trial ordered.

CARPENTER and MONTGOMERY, JJ., concurred with HOOKER, C. J.

MOORE, J. (*dissenting*). The plaintiff is the administrator of Mrs. Gustafson, deceased, who was the mother of defendant. Mrs. Gustafson (then Mrs. Anderson) and the defendant became, by death of Mr. Anderson, the owners of a stock of jewelry. In August, 1889, Mrs. Eger bought her mother's interest in the business, and gave her four notes, the first three of which were paid,

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and are not in controversy here. The last note was dated August 16, 1889, due in four years, and was for $1,134.19. Suit was brought upon it in 1901. The plea of the general issue, with notice of set-off, was filed. It was the claim of the defendant that this note had been fully paid by making to her mother payments of cash, by furnishing her goods out of the store, and by making payments to third persons at her request. Upon the trial the plaintiff introduced the note which was signed by the defendant in evidence. The defendant was then sworn, and testified without objection:

"I am in the jewelry business, carrying on a jewelry store, and have been since August 16, 1889. During this time my husband, Otto Eger, has been my chief clerk or manager, and is still the manager. During the carrying on of this store, since August 16, 1889, I have myself had supervision and oversight of the business. I have been in the store myself. My husband, Otto Eger, kept the books. During the keeping of these books I had general oversight of the accounts as they were entered, and looked them over; knew just what was on the books, and do today."

Mr. Eger was then sworn, and testified:

"I reside in Ishpeming, and am the husband of the defendant in this case. I have been engaged in the jewelry business for the last 10 or 15 years, in my wife's employ. I know what the note of Mary A. Eger, dated August 16, 1889, was given for. The note was given for a half interest in the firm of Anderson & Co., which my wife bought from her mother, and as part payment for it. There were four notes given in all, aggregating $4,134.19. This note represents the last payment. Mrs. Anderson (my wife's mother) said that she intended to purchase quite a good deal of goods out of the store, and that the goods so purchased should apply upon this last note."

Defendant's counsel then asked the witness, "Did she, from time to time, purchase goods from the store in question under that understanding?" To said question plaintiff's counsel objected for the reason that it appeared that the witness was the agent of the defendant, managing the store for her, during all that time, and represented the

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defendant in the contracts made with Mrs. Gustafson, if any contracts were made, and that whatever transactions he had with Mrs. Gustafson were matters which must be equally within the knowledge of Mrs. Gustafson, deceased, and that his testimony in relation thereto was excluded by statute.

"*The Court:* The evidence does not show that he was the agent in making this contract. (Objection overruled, to which ruling the plaintiff's counsel excepted, and witness answered, 'Yes, sir,' and also that Mrs. Gustafson received cash, also, as well as items of merchandise.)"

He then testified that sufficient merchandise and money had been paid to Mrs. Gustafson, or to third persons by her direction, to more than pay the note.

Among other things, the judge charged the jury:

"That brings us to the testimony; and, substantially, the testimony offered here on the part of the defendant was the testimony of Mr. Eger, the husband, and the wife. The claim is made here that this arrangement was made by Mrs. Eger and Mrs. Gustafson as to the application of the payments. And it is without question that the note here was made by Mrs. Eger herself, in her own handwriting. She was not acting as agent or through an agent there, but did the act herself. So the court has admitted the evidence of Mr. Eger in this case, notwithstanding it had to exclude the evidence of Mrs. Eger, because Mrs. Gustafson, the payee of this note, being dead, and this suit being brought by her personal representative, Mr. Gustafson, death having closed the mouth of Mrs. Gustafson, the law closes the mouth of Mrs. Eger as to any matters that were equally within the knowledge of the deceased. But I advise you that this rule would not exclude the testimony of Mr. Eger. That testimony, therefore, is before you; and the court holds that he is not such an agent, having to do with the contract, as the statute contemplates."

The jury rendered a verdict in favor of the defendant. The case is brought here by writ of error.

It was conceded by counsel upon the oral argument that the only question involved is whether the court erred in

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allowing Mr. Eger to testify. The statute to be construed reads as follows:

"SEC. 101. When a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person; and when any suit or proceeding is prosecuted or defended by any surviving partner or partners, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of the deceased partner, and not within the knowledge of any one of the surviving partners. No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died shall be a competent witness, in any suit involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract, against the legal representatives or heirs of such decedent, unless he shall be called by such heirs or legal representatives." Section 10212, 3 Comp. Laws, as amended by Act No. 239, Pub. Acts 1901.

This section, since its amendment, has not been construed by this court. It is the claim of counsel that Mr. Eger was the agent of his wife in selling the goods and making the payments mentioned in the bill of set-off, and that each sale was a contract about which the person making the sale could not testify, and comes within the terms of the statute. They say:

"This statute may, and undoubtedly will, work hardships in certain cases; but the legislature has announced it as the policy of the law, in cases where the lips of one party are sealed by death, to seal the lips of not only the opposite party himself, and those claiming under him, but also the lips of those agents who the law presumes are biased or prejudiced by business relations towards the surviving party. The legislature having so announced the policy of the law in plain and unmistakable terms, allowing of no misinterpretation, and without the slightest ambiguity, it becomes the duty of the court to enforce the statute as it is found on the statute books."

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We cannot agree with counsel in this contention. The contract sued upon in this case is the note signed by Mrs. Eger, and given to her mother. The testimony does not disclose that Mr. Eger had anything to do with the making or continuing of this contract. It is true, he furnished goods and made payments of money which were proper subjects of set-off against the claim for which his wife was sued. If the delivery of each article of goods, or the making of each payment of money, which makes up the 50 items of defendant's set-off, constitutes the person making the delivery of the goods or the payment of the money the agent of the principal, within the meaning of the statute, then, if these goods had been delivered and payments had been made by 50 different clerks in the store, none of them could have testified to the payments or sales made by him or her. We do not think any such result could have been contemplated by the legislature, and such is not the language of the statute. We do not think it applies to sales made by clerks under the supervision of the principal, who fixes the price of the articles sold, and whose directions are simply followed in making the sales. Mrs. Eger was in the control and management of her own business. She made a contract with her mother to buy the mother's interest in the business, and gave her, as a part payment, the note upon which suit is brought. It is not shown that Mr. Eger had anything to do with the making or continuing of this contract. Had his wife sent $500 by him to her mother, which was paid upon this note, but not indorsed thereon, is it possible that he could not testify to the payment? If so, why not testify as to a payment made in goods? I do not think these questions should be answered that he could not. Such a construction of the statute as is urged would make it nearly or quite impossible to ever make proof of the transactions between parties after the death of one of them, and would prevent giving the best evidence of the transaction.

The judgment should be affirmed.

GRANT J., concurred with MOORE, J.

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KUNDINGER v. CITY OF SAGINAW.

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1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS—DECISION OF COUNCIL.

A resolution reciting the intention and understanding of the common council of a city that a bill would be introduced in the legislature to authorize the issue of bonds to construct a bridge, and directing plans and specifications and estimates to be made, together with other similar resolutions, is a sufficient compliance with a charter provision requiring the common council to declare by resolution its decision to make the improvement.

2. SAME—CONTRACTS—LOWEST BIDDER.

A charter which authorizes the board of public works to determine whether a public improvement shall be done by the city or be let by contract, and, if it determines to let it by contract, directing it to advertise for proposals for furnishing materials and performing the work, does not require a contract to be let to the lowest bidder.

3. SAME.

Where a city charter does not require the work of constructing a public improvement to be let to the lowest bidder, a contract for building a bridge is not illegal because made in pursuance of a resolution of the council requiring each bidder to furnish with his proposal a complete plan or drawing showing the style and kind of bridge he intended to construct.

4. SAME—AWARDING OF CONTRACT.

Where a city charter does not require a contract for a public improvement to be let to the lowest bidder, the awarding of a contract to a bidder is discretionary with the proper officials of the city, and their action, taken in good faith, is final.

5. SAME—INJUNCTION—FRAUD.

Injunction bills to restrain the completion of public improvements are not favored where there is no proof of fraud and the contract price is not exorbitant.

6. SAME—BOARD OF PUBLIC WORKS—PLANS AND SPECIFICATIONS —FINALITY OF ACTION.

Where a city charter requires the board of public works to

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prepare, "so far as necessary, plans and specifications" for public improvements, and its members have exercised their best judgment, and have prepared plans and specifications which bidders can understand, the action of the board is not subject to review in the courts.

7. NAVIGABLE RIVERS—BRIDGES—BOARDS OF SUPERVISORS.
The authority granted by the board of supervisors to the city of Saginaw in 1891, to construct a bridge across the Saginaw river on Genesee avenue, was sufficient to authorize its construction in 1902.

8. SAME—OBJECTION BY TAXPAYER.
A taxpayer cannot prevent the construction of a bridge across a navigable river on the ground that it has not been authorized by the board of supervisors.

Appeal from Saginaw; Snow, J. Submitted February 3, 1903. (Docket No. 179.) Decided March 12, 1903.

Bill by Michael Kundinger against the city of Saginaw, William B. Baum, mayor, Alfred Davies, clerk, the board of public works, and the National Bridge Company, to enjoin the carrying out of a contract for the construction of a bridge. From a decree dismissing the bill, complainant appeals. Affirmed.

The undisputed facts as shown by this record are that the Saginaw river, which flows through the city of Saginaw, is a navigable stream, and that the point where Genesee avenue in the city of Saginaw intersects said river is at present occupied by a bridge which has been in use for all the purposes of highway travel, including electric street cars, both city and interurban; that on October 14, 1901, the common council, upon the report of an expert bridge engineer, condemned the bridge as unsafe and unfit for electric street-car traffic, and that from that time to the present time no street cars have run over it, and that the present attempt upon the part of the city authorities is to build a bridge of sufficient capacity to accommodate all highway travel of every kind, and the heavy electric street-railway traffic to which said bridge will be subjected when

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completed; that said Genesee avenue is the most important and general thoroughfare in the city of Saginaw; that application was made by the city of Saginaw to the board of supervisors of Saginaw county at its October session, 1891, to construct an iron swing bridge, with two openings, each 75 feet in width in the clear, providing for the passage of vessels and boats navigating said river, and that said permission was granted by the board of supervisors.

On May 21, 1899, the common council of the city approved a bill, by a vote of 28 to 3, to be presented to the legislature, enabling the city to borrow money to construct a bridge. The bill was presented and passed. It reads as follows:

"SECTION 1. That the common council of the city of Saginaw be and it is hereby authorized and empowered to borrow, on the faith and credit of said city, the sum of not exceeding two hundred thousand dollars, for a period of not exceeding twenty years, at a rate of interest not exceeding five per cent. per annum, and to make, execute, negotiate, issue, and sell the bonds of said city therefor, with proper interest coupons attached thereto, in such manner as said common council shall determine, which said bonds in no case shall be sold for less than their par value.

"SEC. 2. Said bonds shall be denominated bridge bonds, and the proceeds thereof shall be used in defraying the expense of building approaches to and the building of a bridge across the Saginaw river at Genesee street, in the city of Saginaw, county of Saginaw, and State of Michigan, and for no other purposes.

"SEC. 3. Said improvements shall be made and money expended therefor by the board of public works under the direction of the common council." Act No. 446, Local Acts 1899.

Various proceedings were afterwards had by the board of public works and by the common council, and various bids received, and on January 13, 1902, the common council, by unanimous vote, instructed the board of public works to at once advertise "for competitive plans and bids, in accordance with the specifications now on file in the city

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engineer's office, for a bridge over the Saginaw river, located at Genesee avenue, in the city of Saginaw, Mich." By the same motion the council recommended the employment of an expert bridge engineer to examine all bids submitted. Pursuant to this resolution, the board of public works advertised for sealed proposals for constructing a bridge at Genesee avenue, and that each bidder be required to furnish with his proposal a complete plan or drawing showing the kind and style of bridge that he intended to construct, and that each bidder be required to deposit with his proposal a certified check on some bank in the city of Saginaw for $3,000, or a bank draft on New York, and that the successful bidder be required to furnish a Fidelity or other surety company bond, in such amount as the board of public works might determine, for the faithful performance of the contract.

The board of public works reported all the bids received by it on February 27th to the common council at a meeting held on the 24th day of March, 1902, recommending that the contract be let to the King Bridge Company for a swing bridge, in accordance with one of its proposed plans, at a cost of $155,475. At this same bidding the defendant National Bridge Company put in a number of bids, including a bid on plan numbered B-2, with the Scherzer Rolling Lift, for $184,000. And at this same meeting of the council there was presented a communication from the board of trade of the city of Saginaw in support of a Scherzer Rolling Lift bridge, which was represented by the following resolution:

"*To the Honorable the Common Council of the City of Saginaw*:

"The following action was taken at a meeting held at the board of trade rooms, Friday, March 21, 1902:

"*Resolved*, that we believe it would be a serious mistake to erect a bridge at Genesee avenue that was recommended by a bare majority of the board of public works at its meeting last evening.

"We believe that this location demands the best and most modern structure now known.

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"We believe that the Scherzer Rolling Lift bridge is such a structure.

"Therefore, we request that the common council cause to be constructed at Genesee avenue a modern bridge, with a Scherzer Rolling Lift draw span, at the earliest possible time, believing that by so doing the interests of the city will be best subserved."

This resolution was approved by citizens to the number of 464. The common council rejected the recommendation of the board of public works to let a contract to build a swing bridge. The council then authorized and directed the board of public works to contract with the National Bridge Company in accordance with its plans submitted, including the Scherzer Rolling Lift, at a cost of $184,000, and so notified the board of public works.

Subsequently the contract with the National Bridge Company for a Scherzer Rolling Lift bridge was prepared, approved by the city attorney, executed by the National Bridge Company, and two bonds were presented, signed by the Fidelity & Deposit Company of Baltimore, Md. The plan of the proposed bridge was approved by the Secretary of War. At this point in the proceedings, and on June 26, 1902, the complainant filed this bill to enjoin the defendants from carrying out the proposed contract, alleging that it was illegal and void.

The National Bridge Company made an agreement with the Scherzer Rolling Lift Bridge Company by which it secured the right to use its patent appliance in the construction of this bridge at the agreed price of $6,000. General plans and specifications were made by the city engineer under the direction of the board of public works, and were on file. The engineer also made an estimate of the probable cost, showing it to be $186,500. These plans and specifications contained all the *data* essential for intelligent bidding. The specifications number 151, and cover 31 pages of the record, besides an outline plan of the bridge prepared by the city engineer. There were 58 bids. The American Bridge Company made six different plans and six bids, ranging in price from $149,000 to

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$188,000; another submitted three different plans and three bids, ranging from $181,000 to $192,000; another offered thirty plans and thirty bids, ranging from $152,327 to $203,727.

The city engineer testified, in answer to the question why he did not prepare one complete plan, and specifications for one bridge, so that bids could be received on that,—

"Because of an understanding I had that they wanted the widest possible competition, and the general belief that the bridge companies, by submitting their own plans, would give us a bridge which would fulfill the requirements of the specifications, and at less price than, perhaps, we, who are not bridge specialists, could prepare."

There was also testimony that this method of securing bids was quite common, and fully protected the interests of the city.

The case was heard upon pleadings and proofs taken in open court, and the bill dismissed.

F. E. Emerick (*L. T. Durand*, of counsel), for complainant.

Miles J. Purcell, for defendant National Bridge Co.

Henry E. Naegely (*George W. Weadock*, of counsel), for other defendants.

GRANT, J. (*after stating the facts*). The necessity for the construction of a new bridge to replace the old one over the river at Genesee avenue had long been recognized, both by the city authorities and the traveling public. It had been the subject of discussion in the various proceedings of the council for about two years. Plans had been made and submitted to the Secretary of War, and had been rejected. Others were made. The matter was the subject of open discussion. The bridge was finally condemned as unfit for use by heavy teams and street cars. A plan was finally approved by the Secretary of War, and the common council proceeded in accordance with the

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authority of the special act, and proceedings were had which resulted in authorizing the contract to be made with the defendant the National Bridge Company.

Fraud is charged in the bill. No claim of fraud or dishonesty on the part of the public officials is made in the briefs of counsel, nor was any made upon the oral argument. This charge, therefore, has failed, and the only questions before the court are questions of law, based upon the undisputed facts of the case.

1. The first question presented is, Does the special act confer independent authority upon the common council and the board of public works to construct the bridge, or is their power limited thereunder by the provisions of the charter? The contention of complainant is that the act is supplementary to the charter, and that, while the act authorizes the construction of the bridge, all the proceedings preliminary to and authorizing a contract for its construction must be in accordance with the charter. The contention of the defendants is that the special act confers authority upon the common council and board of public works to construct the bridge without any reference to the charter provisions. The court below held with the complainant that the special act and the charter must be construed together, but found that the proceedings were regular under the charter provisions. We find it unnecessary to determine whether the special act alone should control, as we agree with the conclusion of the court below that the proceedings are in substantial compliance with the terms of the charter.

Complainant insists that there is a fatal defect, in that section 9 of title 12 of the charter was not complied with. Section 2 of the same title provides that "the board of public works shall, after the said public improvements have been first duly ordered by the common council, have supervision and charge of the construction * * * of bridges," etc. Section 9 provides that, "whenever the common council of said city shall have decided upon the making of any such public improvement, it shall so

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declare by resolution," whereupon the board of public works is required to make an estimate of the materials, cost, expenses, etc. The objection is a technical one at best. We think the various resolutions and proceedings of the common council constitute a sufficient compliance with the charter provisions. The resolution of the common council on February 14, 1898, recited the intention and understanding that an act would be introduced in the legislature at the next session to authorize the issue of bonds to construct the bridge, and directed plans, specifications, and estimates to be made. Other similar resolutions were passed subsequently and acted upon. The legislature, by the special act, recognized the question of a bridge as settled. The decision and determination of the council could not be made to appear more clearly by a formal resolution.

2. The next contention of the complainant is that the method adopted by the council as a basis for bids is illegal. He contends that the common council and the board of public works should have determined exactly upon the character of the bridge proposed to be built, and solicited bids only for one kind of a bridge. He claims that if the council desired the Scherzer Rolling Lift bridge, the draw of which was patented, it should have determined upon that, and solicited bids. Counsel cite, as supporting this proposition, *Cass Farm Co.* v. *City of Detroit*, 124 Mich. 438 (83 N. W. 108); *Moreland* v. *Common Council of Detroit*, 130 Mich. 343 (89 N. W. 935); *McBrian* v. *City of Grand Rapids*, 56 Mich. 95 (22 N. W. 206); and other cases. All of them are, however, cases, as we read them, wherein the charter involved required the contract to be let to the lowest bidder. In such cases the city authorities must determine the kind and character of the bridge, materials, etc. This rule, however, does not apply to cases where the charter does not require the contract to be let to the lowest bidder. *Yarnold* v. *City of Lawrence*, 15 Kan. 126. This is a well-reasoned case by Justice Brewer.

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Section 5 of title 6 of the charter provides:

"Whenever any improvement is ordered in any street, except paving, repaving, planking, or macadamizing, the board of public works shall have authority to determine whether such improvement shall be done by the city under the direction and supervision of the board of public works, or whether bids shall be solicited and the improvement be let by contract."

Section 4 of the same title provides:

"The common council shall have the power to cause the common sewers, drains, vaults, arches, and bridges, culverts, wells, pumps, and reservoirs to be built in any part of said city, to cause the grading, raising, leveling, repairing, paving, repaving, repairing, or covering with stone, brick, blocks, plank, or other material any street, avenue, lane, alley, highway, public ground, sidewalk, or crosswalk of said city, but all such improvements shall be done by the board of public works, as herein provided; but no such public improvement shall be made by paving in any way except upon an affirmative vote of two-thirds of all the aldermen-elect, unless a majority of all the property owners having property fronting on the place to be so improved shall have petitioned the common council to make such improvement, in which case a majority vote of the council shall be sufficient to order the same."

Section 9 of title 12 provides:

"The said board of public works shall (except in the case of the cleaning and deepening of ditches and gutters, and the repair of streets and sidewalks) *advertise for proposals*, except as herein otherwise provided, for the furnishing of material and for the performance of such work, and shall require all bidders to furnish security for the performance of proposals tendered to said board if the bid is accepted, and also security for any contract awarded; and all bids submitted to said board shall be publicly opened by it, and, as soon as may be thereafter, reported by the said board, together with its recommendation in respect thereto, to the common council, and no contract shall be let by the said board until it is duly authorized by the common council."

These are the strongest provisions of the charter in regard to letting contracts after advertising. Manifestly

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they do not require that contracts must be let to the lowest bidder. It is discretionary with the board, and when it acts in good faith its action is final.

The method adopted by the defendants secured to the city competitive bids both upon plans and cost. See *Attorney General* v. *City of Detroit*, 26 Mich. 263. This view of the case is well stated by the chief engineer of the defendant bridge company, in describing the competition which the plans and specifications invited. He testified:

"The general specifications and Cooper's specifications called for the plans referred to,—call for a definite result; that is, abutments of a certain kind, ornamented in a certain way, balustrades of a certain kind, hand railing of a certain kind, draw span of a certain width located at a certain point, the abutments to begin at a certain point and end at a certain point; the grade not to be higher than necessary, and, if possible, not higher than the old bridge; and the quality of all materials was defined; and any bridge company in figuring upon that would want and naturally be anxious to get the most economical bridge that could be gotten, beauty and strength considered. Now, then, a great many different plans could be gotten, and they would all conform to those certain necessary qualifications; the roadway paving would be a certain kind, the walk and roadway be a certain width, capacity, etc., the roadway and sidewalks and street-car tracks just as called for, and in the location, and as to the height of the roadway, all those things would be the same, and in any case the city would get a thoroughly good bridge."

The complainant gave no testimony that the contract price was excessive. It was, in fact, $2,500 below that of the careful estimate of the city's chief engineer. If the price was unreasonable, or if any *bona fide* offers were made to build the bridge for a considerably less sum, it was open to the complainant to give the proof thereof. Courts do not look with favor upon injunction bills to restrain or hinder the completion of public improvements, unless there is proof of fraud. Such fraud may perhaps be inferred where the price is exorbitant.

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3. It is urged that the specifications are not sufficiently definite. The charter, section 9, tit. 12, requires the board of public works to prepare, "*so far as necessary*, plans and specifications for such work or improvement." Its action in this matter is final when its members have exercised their best judgment, and have prepared plans and specifications which bidders can understand and act upon intelligently. The law does not give to courts the power to substitute their judgment for the honest judgment of the board. Only when such board has acted fraudulently, or, perhaps, has ignorantly prepared plans and specifications which are clearly insufficient to form a basis for intelligent and fair bidding, can courts interfere.

4. The authority granted by the board of supervisors, in 1891, to the city to construct a bridge, is sufficient to cover the construction of the present bridge. Where the board of supervisors has once granted such permission, and the bridge is completed in accordance therewith,—*quære*, whether any further permission is required, either to repair the old bridge, or to erect a new one in its stead, so long as all the facilities for the use of the stream and the highway are retained to the public. Moreover, this is a question which does not concern the complainant. So long as the public authorities are content, it is no concern of his whether the supervisors have taken the proper action.

The decree is affirmed, with costs.

The other Justices concurred.

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REID *v.* WAYNE CIRCUIT JUDGE.

1. APPEAL BOND—PAYMENT OF DECREE.
   An appeal bond in chancery does not secure the payment of a decree which is otherwise secured. *Kennedy* v. *Nims*, 52 Mich. 158.

2. SAME—STARE DECISIS.
   The former decision that an appeal bond does not secure the payment of a decree otherwise secured, even if wrong, will not be overruled, as it would impose upon those who became sureties, relying upon it, obligations from which they had a right to suppose themselves exempted.

Mandamus by James Reid and others to compel Joseph W. Donovan, circuit judge of Wayne county, to vacate an order requiring an excessive appeal bond. Submitted November 18, 1902. (Calendar No. 19,644.) Writ granted March 12, 1903.

Tarsney & Fitzpatrick, for relators.

C. A. Kent, for respondent.

PER CURIAM. This is an application for a *mandamus* to compel respondent to set aside an order fixing the penalty of an appeal bond at the sum of $30,000. Relators are the defendants in a chancery suit brought by Edmund Hall. The court below rendered a decree finding that relators were indebted to said Hall, on an accounting, for a large sum of money, and that this indebtedness is secured by certain property. It decrees that this property shall be sold, the proceeds applied to reduce said indebtedness, and declares that said Hall is entitled to a personal decree against the defendants for the balance. The court below, proceeding upon the ground that the appeal bond secured the payment of said balance, made the order complained of, and refused to approve a bond proffered by relators for the penal sum of $1,000.

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Kennedy v. *Nims*, 52 Mich. 153 (17 N. W. 735), decides that the appeal bond does not secure the payment of such balance. While the reasoning upon which this decision was based was disapproved by this court in the case of *Richardson* v. *Richardson*, 82 Mich. 305 (46 N. W. 670), its effect as an authority, on the facts involved, has never been shaken. Indeed, in *Richardson* v. *Richardson* this court recognizes that the appeal bond does not secure the payment of a decree which is "otherwise secured." Respondent's counsel contends that *Kennedy* v. *Nims* was incorrectly decided, and should be overruled. We must decline. Even if that case was not properly decided, the rule of *stare decisis* should apply. To overrule it would impose upon those who became sureties, relying upon said decision, obligations never voluntarily incurred, and from which they had a right to suppose themselves exempted.

The writ of *mandamus* must issue as prayed.

SMITH *v.* MARSH.

CONVEYANCES—PAROL TRUST—STATUTE OF FRAUDS.

A voluntary conveyance, executed without fraud or mistake, and without any request by the grantee, between whom and the grantor no confidential relations existed, will not be set aside at the suit of the grantor, on the ground that it was given and accepted under a parol trust which has not been carried out.

MOORE, J., dissenting; being of the opinion that the deed was made in pursuance of a contract, the advantages of which defendants seek to retain while repudiating its obligations.

Appeal from Washtenaw; Kinne, J. Submitted June 5, 1902. (Docket No. 102.) Decided March 23, 1903.

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Bill by Rebecca R. Smith against Mary Marsh, administratrix of the estate of Jane Lamb, deceased, James B. Lamb, Ellen Clifford, and Isabella Clifford, to set aside a deed. From a decree for complainant, defendants Lamb and Clifford appeal. Reversed.

Complainant and defendants are brother and sisters, the children of James and Mary Lamb, deceased. James and Mary lived in Canada, where James owned an extensive farm. He died some time prior to 1867. Jane and Rebecca were twins. After his death his estate was settled, and the property sold and converted into money. The defendants Isabella and Ellen released all their interest in the estate of their father to their mother. Jane and Rebecca, with their mother, came to Michigan, and purchased some land, the title to which was taken in Rebecca and Jane as tenants in common. That was sold, and the land here in controversy purchased; the title being conveyed to them in the same way. On September 11, 1897, complainant executed a warranty deed of her undivided one-half of these lands to her sister Jane, who died in September, 1899. The object of this bill is the annulment of that deed. The basis for the relief prayed is found in the following allegation in paragraph 4 of the bill:

"Your oratrix further shows that, upon the administration of the estate of her said father, she and the said deceased, Jane Lamb, received their portion of said estate; that they were twin sisters, and agreed to unite their property and to live together during the balance of their lives; that at that time your oratrix was married to said Robert Smith, and by the terms of said agreement the said Jane Lamb was to have a home in the family of your oratrix; and it was further agreed by and between your oratrix and the said Jane Lamb that the survivor of the two, as between your oratrix and the said Jane Lamb, should be entitled to the entire joint property of the said Jane Lamb and your oratrix; and it was further agreed by and between your oratrix and the said Jane Lamb that, in case your oratrix should die before the said Jane Lamb, then and in that case the said Jane Lamb should have the

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use, income, and profit arising from said joint estate during her life, and at her death it should go to the children of your oratrix."

Paragraph 17 of the bill reads as follows:

"Your oratrix further shows that by reason of the fact that she was born first, and because of a certain superstitious belief that, as between twins, the one who was first born would first die, and by reason of the fact that your oratrix had, to a considerable extent, lost her health, your oratrix and the said Jane Lamb, so long as she lived, were of the opinion and belief that the said Jane Lamb would certainly survive your oratrix; that by reason thereof, and by reason of the agreement aforesaid, and in order to escape the expenses and cost of the administration of her estate, and to avoid, as far as possible, litigation over the settlement of her estate, your oratrix and the said Jane Lamb were always anxious, whenever your oratrix was in feeble health, that the title to the entire property should be in the name of Jane Lamb, and that therefore the conveyances from your oratrix to the said Jane Lamb in every instance were intended to operate simply as a will, and not as a conveyance; and therefore your oratrix avers and charges that the said paper purporting to be a deed, bearing date the 11th day of September, 1897, might and in justice and equity ought to be declared to operate as a will, and not as a conveyance of said property, and in justice and equity ought to be set aside and declared null and void.

"Your oratrix further shows and charges that said Jane Lamb was a stronger-minded person than your oratrix, and possessed great and unbounded influence over your oratrix; that a relation of trust and confidence, to the greatest possible extent, existed between your oratrix and said Jane Lamb; that your oratrix had the utmost confidence in her said sister, and suffered her, to a large extent, to manage and control their joint business affairs; that said Jane Lamb exerted great influence over your oratrix, and by reason of said relation of trust and confidence, and of her superstitious belief that she would certainly die first, and in reliance upon the promise aforesaid of her said sister that, in case your oratrix would deed her interest in said property to her said sister, she, the said Jane Lamb, would deed over said joint property to the children of your oratrix before her death, and by reason

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of the further inducement held out to her by her said sister that by deeding said property to said Jane Lamb, and by said Jane Lamb to the children of your oratrix, all the expenses of administration would be saved, your oratrix was induced to make said deed last aforesaid; and your oratrix is advised and believes that by reason of the premises a trust resulted to your oratrix, and that by reason thereof the title to said lands ought by this court to be decreed to be vested in your oratrix.

"Your oratrix further avers and charges that the undivided one-half of the real estate mentioned in said deed from said William A. Benedict and wife to the said Jane Lamb and your oratrix is the property of your oratrix by virtue of purchase from said Benedict and wife, and that, under and by virtue of the conditions of the contract mentioned in paragraph 4 of said bill of complaint, the other one-half of said real estate is also the property of your oratrix, and that the undivided one-half of the personal property, stock, tools, farming implements, utensils, and all personal property mentioned in the paper purporting to be a deed, bearing date the 11th day of September, 1897, is the property of your oratrix by virtue of her original rights in said property, and that the other undivided one-half of said personal property, under and by virtue of the condition and provisions of the contract mentioned in paragraph 4 of this bill of complaint, is also equitably the property of your oratrix, and might and in justice ought to be so declared and decreed by this honorable court to be."

The bill prays that the deed may be set aside, and that the contract above set forth shall be declared to have been performed and kept by her, and that she be decreed to be the owner in fee of the undivided one-half of said land. The answer denies all the material allegations of the bill, and interposes the statute of frauds as a defense. Proofs were taken in open court, and the learned circuit judge granted the relief prayed.

Four witnesses were introduced by complainant, and gave testimony claimed to sustain the allegations in the bill, viz., her son, daughter, son-in-law, and the attorney who drew the deed in question. The son testified:

"She [Jane] said I would get what she had after her death, anyway, if I stayed there. * * *

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"*Q.* And it is true that your aunt said to you, if you stayed there at home and worked on the farm, she would be responsible for your wages, and give you her farm when she got done with it?

"*A.* Yes, sir."

The daughter testified:

"*Q.* Did you know about their making a contract having an understanding and agreement what should be done with the property that was upon the farm?

"*A.* Yes; I have always understood that when mother was sick—and she was always in more or less ill health—that she would transfer her property to Miss Lamb, and at her death it was to come to her sister's children. At one time Miss Lamb stated over that contract at our house. Those transfers that have been read of those various interests had reference to that fact. That was the summer before she died or was killed. It was to come to my brother and myself. It was to be divided between us two.

"*Q.* Do you remember whether or not at that time anything was said as to how it was to be done, in order to avoid the expense of a will, of probate court, etc.?

"*A.* She always said she was going to deed it. * * *

"*Q.* I call your attention to the interview at your house about six months, or such a matter, before your Aunt Jane's death, and ask you to state what your Aunt Jane said the contract was between her and your mother in relation to this property.

"*A.* That they always intended to live together the rest of their days, and that Mrs. Smith's property should be Miss Lamb's, and at her death it should go to the children."

The son-in-law testified that, about six months before Jane's death, he heard her say that at her (Jane's) death the property "should go to my wife and James Smith. I remember her talking over that it had been deeded for that purpose."

The attorney who drew the deed testified:

"I remember seeing Jane Lamb and Rebecca Smith at my office, and having a conversation with them in relation to drawing a deed.

"*Q.* Did they state why they wanted a deed drawn?

"*A.* I cannot remember the exact conversation that took place at that time. I can remember the import of it.

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The talk between all parties at that time was concerning their both owning the property, but that they wanted it in shape that if one died the other would get it; and, in making a deed, Miss Lamb made the deed, I believe, to Rebecca Smith, and the understanding was that Rebecca was to make it back again. I think I have it reversed. I told them they would better finish the whole transaction right there, but, as a matter of fact, they did not. They did part of it. I tried to get them to finish the transaction, but she promised to come down again, and she did come down,—Miss Lamb.

"*Q.* They were to make each one a deed to the other?

"*A.* That was the idea.

"*Q.* And then the one who died would have the property?

"*A.* That was the understanding when they were there at the office. They wanted to leave it in shape so that the survivor would get it.

"*Q.* You made that deed with that understanding?

"*A.* I made the deed with that understanding; yes, sir; that there would be a deed back; yes.

"*Q.* Do you remember now whether or not they talked over the fact of their living together and their owning this property, and the agreement between them that the survivor was to have the property,—it was to come to the children of Mrs. Smith?

"*A.* The talk that they had was that the one who survived should have the property. That was the talk at that time, and that was the intention when they made out the deed. At least, that was what they both of them told me. And this lady, Miss Lamb, came to the office afterwards to make out that deed, and I told her if she would come in we would make it right out; and she said she had to go over town, and as quick as she came back she would see to it. When she came back I was prepared to make the deed, but she did not have the description, and I did not have it, and it ran along. She said she would come right in again, but, as a matter of fact, she did not."

The following facts are either conceded, or are, in my judgment, established by a clear preponderance of evidence: The money which purchased this farm came from the father of complainant and the defendants. Isabella and Ellen released their rights in the estate to their mother without any consideration. Eight thousand dollars was

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the purchase price of the first farm. Of this amount, $5,000 belonged to the mother. She gave it to Jane upon the agreement that Jane should take care of her during her life. The deed was made by complainant to Jane after Rebecca was sued by one of the farm hands to recover his wages. She then stated that she was not the owner of this land; that she had no interest in it or the property thereon; that she and her husband leased it from Jane; that plaintiff could get nothing from her, as she had no property. She took no steps whatever to obtain a written statement from Jane of her alleged interest. For two years she rested upon this parol agreement on the part of her sister to convey to her. Complainant wrote letters, through her son, to her sisters and brother, after the death of Jane, in which she said nothing about this agreement. She asked them to release their interests to her without any consideration. These letters are inconsistent with her present claim.

Complainant's husband died October 4, 1895. He lived with his family upon the lands owned by Jane and Rebecca until his death, worked on the farms, and had his support. His son, James, always lived at home with his mother and Jane. The daughter, Mary, was married, and did not live at home after her marriage. The daughter was appointed administratrix of Jane's estate, and made one of the parties defendant to this suit. Her brother presented a claim of $1,800 against the estate of Jane for his labor after he became 21 years of age. To this claim his sister, the administratrix, made no defense. Complainant was cognizant of all these proceedings, and made no objection thereto.

A. J. Sawyer & Son, for complainant.

Lehmann & Stivers, for appellants.

GRANT, J. (*after stating the facts*). 1. The purpose of this bill is not to enforce the specific performance of the alleged parol contract stated in paragraph 4, but to set

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aside the deed made about 30 years afterwards in reliance upon the existence of some such an agreement. The theory of the bill, as stated in paragraph 17, above given in full, is that, if complainant would deed her interest in the land to her sister, her sister would deed over all said joint property to complainant's children before her (the sister's) death, and by reason of the further inducement held out by her sister that by so deeding the property to Jane, and by Jane's deeding it to the children, all expenses of administration would be saved. That theory is supported by the testimony of her son and daughter and her son-in-law that the property was to be deeded to them by Jane. If the testimony of the attorney who drew the deed should be construed into an agreement that in some way, unexplained, deeds would be made by each to the other in such a manner that the property would go to the survivor, and complainant executed her part of that contract by making the deed, and Jane refused or neglected to execute a deed on her part to carry out the agreement, we are not prepared to say that complainant might not be entitled to relief, by a proper bill, on the ground of a contract executed on her part for a valid consideration. But such is not the theory of the bill, nor does such an arrangement accord with the testimony of complainant's children and son-in-law. Nor do the learned counsel for complainant base complainant's rights upon any such arrangement. They base it solely upon the alleged confidential relation that existed between the two sisters. They say:

"Transactions between parties occupying relations of trust and confidence will be carefully scrutinized, and no advantage will be permitted to be taken of the trust relation, and a deed taken by one occupying such a relation should be canceled."

And they cite authorities claimed to sustain this principle. They assert that Jane was the stronger minded of the two, and that she had great and unbounded influence over Rebecca. In this way they seek to avoid the effect of the statute of frauds, which requires every conveyance

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of land to be in writing. Section 9509, 3 Comp. Laws. The circuit judge evidently recognized the difficulty to thus avoid the statute, for in his opinion he says:

"I am not certain but the bill ought to be dismissed. * * * The peculiar hardships of the case are such that I have traversed the territory of equity jurisprudence to see, if possible, I might not find some channel of relief. * * * The conduct and manipulation of their joint property display extreme childishness, superstition, and ignorance. It hardly seems just to hold them to any legal accountability. All of their action is characterized by extreme folly. * * * The statute of frauds now confronts the complainant with dangerous menace. If it is to control in the case, then, instead of operating as a protection, it will serve the purpose of perpetrating a fraud and depriving the complainant of her just right."

He further found that there was no fraud or mistake. There being no fraud or mistake, it follows that the conveyance was voluntary. We do not think there is any evidence in the case to show that complainant made this deed to Jane at even the request of the latter. She was not persuaded or influenced by Jane to execute it. Rebecca was as strong-minded as was Jane, and evidently had as much control of affairs as did Jane. We find that there were no confidential relations such as to avoid this deed as not within the statute of frauds. The statute is a wise and beneficent law. It cannot be frittered away because the parties to deeds are ignorant and do not fully understand their rights. It must govern the conduct of the learned and the unlearned alike. We think this case is controlled by the principle stated in *Pierson* v. *Conley*, 95 Mich. 619 (55 N. W. 387); *Kelsey* v. *McDonald*, 76 Mich. 189 (42 N. W. 1103); *McCarn* v. *Wilcox*, 106 Mich. 64 (63 N. W. 978); *Shafter* v. *Huntington*, 53 Mich. 310 (19 N. W. 11). Many other cases of the same import might be cited. Courts cannot negative the statute because in an individual case it operates as a hardship.

2. We cannot, however, adopt the conclusion reached by the circuit judge that this land, "in morals and jus-

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tice," belongs to complainant. In the distribution of the estate she is entitled to one-fourth of it. The money, or at least most of it, with which it was purchased, came from the father and mother of all these parties. Complainant has lived out of it for more than 30 years, and has reared her family upon its proceeds. Two of the defendants released all their interest to their mother, and all they were entitled to is invested in this land. We can see no great injustice in the fact that all must share equally.

Decree reversed, and the bill dismissed, with costs of both courts.

HOOKER, C. J., and MONTGOMERY, J., concurred with GRANT, J.

MOORE, J. (*dissenting*). Rebecca R. Smith, James B. Lamb, Ellen Clifford, and Isabella Clifford are brother and sisters, and the only surviving heirs of Jane Lamb, deceased. Rebecca R. Smith and Jane Lamb were twins. At the time Jane Lamb died, the record title to certain real estate was in her. The bill is filed for the purpose of having the title to an undivided one-half of the property decreed to be in complainant. The circuit judge granted the prayer of the bill. The defendants have brought the case here by appeal.

The record is long. Some testimony was taken that is incompetent, some that is immaterial, and some that is unreliable. Among other testimony offered by complainant is a deed of a farm purchased in 1867, taken in the name of the complainant and her twin sister, the deceased, Jane Lamb. This farm was sold, and another purchased with the proceeds, in 1871; the deed running to the complainant and her sister Jane. It is also made to appear that in 1873, when complainant was in ill health, she conveyed her interest in the real estate to her sister Jane, who afterwards reconveyed an undivided one-half of it back to Rebecca. In 1897 Rebecca again conveyed this land to her sister Jane, and the record title remained in her when

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she was killed upon the railroad. I have not overlooked the claim of defendants that these conveyances were made to avoid paying debts, but, in view of the small amount of debts, I do not attach much importance to this claim. The lawyer who drew the last deed from Rebecca to Jane testified, in substance:

"I remember seeing Jane Lamb and Rebecca Smith at my office, and having a conversation with them in relation to drawing a deed.

"*Q.* Did they state why they wanted a deed drawn? * * *

"*A.* I cannot remember the exact conversation that took place at that time. I can remember the import of it. The talk between all parties at that time was concerning their both owning the property, but that they wanted it in shape that if one died the other would get it. * * * I told them they would better finish the whole transaction right there, but, as a matter of fact, they did not. They did part of it. I tried to get them to finish the transaction, but she promised to come down again, and she did come down,—Miss Lamb.

"*Q.* They were to make each one a deed to the other?

"*A.* That was the idea.

"*Q.* And then the one who died would have the property?

"*A.* That was the understanding when they were there at the office. They wanted to leave it in shape so that the survivor would get it.

"*Q.* You made that deed with that understanding?

"*A.* I made the deed with that understanding; yes, sir; that there would be a deed back; yes. * * *

"*Q.* Do you remember now whether or not they talked over the fact of their living together and their owning this property, and the agreement between them that the survivor was to have the property,—it was to come to the children of Mrs. Smith? * * *

"*A.* The talk that they had was that the one who survived should have the property. That was the talk at that time, and that was the intention when they made out the deed. At least, that was what they both of them told me. And this lady, Miss Lamb, came to the office afterwards to make out that deed, and I told her if she would come in we would make it right out; and she said she had to go over town, and as quick as she came back she would

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see to it. When she came back I was prepared to make the deed, but she did not have the description, and I did not have it, and it ran along. She said she would come right in again, but, as a matter of fact, she did not.

"*Q.* I hand you paper [deed from complainant to Jane Lamb], and ask you to look upon it and tell me whether that is the paper you made at that time for these people?

"*A.* Yes; this is the instrument."

No other consideration passed. The complainant continued to reside on the farm, and still resides there.

After sifting all the testimony, and eliminating that which ought not to have weight, I am satisfied the circuit judge was justified in finding:

"That Rebecca Smith and Jane Lamb were essentially one, in thought, interest, and action. They lived for each other, and in rare intimacy. * * * The present lamentable condition of the complainant is due to the sudden and unexpected death of Jane Lamb. * * * That, in morals and justice, Rebecca Smith owns at least one-half of the property in question in the case. It was purchased with her money. It was never given away or sold by her. She never parted with the possession of it. She never intended to surrender it, except in the event of her death before the death of her sister. Certainly Jane Lamb did not take the title with any thought or intention of holding it as against Rebecca Smith. It was her purpose to restore it to its rightful owner."

Does the statute of frauds stand in the way of affirming this decree, as claimed by the solicitors of defendants? The statute referred to is section 9509, 3 Comp. Laws, which provides:

"No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by some person thereunto by him lawfully authorized by writing."

The case is not free from difficulty. This is not a bill

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asking that the representatives of Miss Lamb be required to carry out her oral contract. The complainant does not seek to acquire interests in the lands by reason of an oral contract. The bill sets out all the facts, showing that the only consideration for the making of the deed by the complainant was the agreement of Miss Lamb, which has not been executed, and that there has been an entire failure of consideration for the making of the deed, and asking that the deed made by the complainant be canceled, and the record title be restored to her. The defendants are not invoking the aid of the statute simply to avoid the necessity of complying with the contract made by Jane Lamb, but they seek to use it in such a way as to repudiate the contract, and at the same time retain the title to the land which was conveyed by the complainant in reliance upon the contract. If the facts are as stated by the lawyer who drew the deed, if, the next day after it was obtained, Miss Lamb had refused to carry out her part of the agreement, and insisted she was the absolute owner of the land, can there be any doubt about the right of a court to grant the complainant relief? Does the fact that Miss Lamb died before carrying out her agreement prevent the court granting relief? Do the heirs of Miss Lamb stand in any better position than she?

In Browne, Stat. Frauds (5th Ed.), 145, in discussing the effect of the statute of frauds, it is said:

"A party, however, who has paid money in fulfillment of a verbal contract, which the other refuses or becomes unable to carry out, may recover it in an action for money had and received; he may also recover property, or its value, delivered in the same way, by any suitable proceeding," citing a large number of cases.

In *Kilbourne* v. *Wiley*, 124 Mich. 370 (83 N. W. 99), there is a discussion of the statute of frauds, where a solicitor sought to enforce an oral agreement that he should have a lien upon land for the value of his services in clearing up the title. The court quoted with approval from *Huxley* v. *Rice*, 40 Mich. 73, as follows:

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"'It is the settled doctrine of the court that, where a conveyance is obtained for ends which it regards as fraudulent, or under circumstances it considers as fraudulent or oppressive, by instant or immediate consequence, the party deriving title under it will be converted into a trustee, in case that construction is needful for the purpose of administering adequate relief; and the setting up the statute against frauds by the party guilty of the fraud or misconduct, in order to bar the court from effective interference with his wrong-doing, will not hinder it from forcing on his conscience this character, as a means to baffle his injustice or its effects. 2 Comp. Laws 1871, §§ 4692, 4693; 1 Story, Eq. Jur. §§ 330, 333; 2 Story, Eq. Jur. §§ 1254, 1265; 1 Spence, Eq. Jur. 511; 2 Spence, Eq. Jur. 194, 294, *et seq.*; Hill, Trustees, 144; *Mestaer* v. *Gillespie*, 11 Ves. 621; *Pickett* v. *Loggon*, 14 Ves. 215, 234; *Barnesly* v. *Powel*, 1 Ves. Sr. 284, 289; *Young* v. *Peachy*, 2 Atk. 254, 257; *Brown* v. *Lynch*, 1 Paige, 147; *Hutchins* v. *Lee*, 1 Atk. 447; *Wolford* v. *Herrington*, 74 Pa. St. 311 (15 Am. Rep. 548); *Gregory* v. *Williams*, 3 Mer. 582.'

"See, also, *Miller* v. *Aldrich*, 31 Mich. 408."

In *Nugent* v. *Teachout*, 67 Mich. 571 (35 N. W. 254), Nugent conveyed to Teachout 40 acres of land. The latter agreed orally to convey, as part payment for the land conveyed to him, an acre of land, and the house thereon. After he got the deed, Teachout not only refused to deed the acre of land, but sold it to a third party. Nugent sued Teachout. In holding that Nugent could recover, the court said:

"But it must be remembered that this promise on the part of the defendant to convey the Cadillac property in part payment of the lands received by him was an oral one, and therefore within the statute of frauds, and one that he could not be obliged to perform. What, then, are the rights, and what is the remedy, of the plaintiff? He has conveyed the 40 acres to the defendant, and the defendant has received it, and accepted the benefit of it. Does he not, in equity and good conscience, owe the plaintiff the balance of the price or value of the land in money? Is there not an implied promise on the part of the defendant to pay the plaintiff the price or value of the land conveyed? We think there is. Although he was not

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obliged to convey the Cadillac property, because his promise to do so was void under the statute of frauds, yet his refusal to convey had the effect to rescind the contract, and raised an implied promise to pay for what he had received upon it. *Gray* v. *Hill*, Ryan & M. 420; *Basford* v. *Pearson*, 9 Allen, 387, 392 (85 Am. Dec. 764)."

In *Champion* v. *Munday*, 85 Ky. 31 (2 S. W. 546), part of the consideration for a conveyance of land was an oral agreement that the vendee would give to the vendor the right of passage over lands not mentioned in the deed. In disposing of the case, the court said:

"As the deed was not signed by the appellant, nor any writing executed by him evidencing the appellee's right to the passway, it is urged that the contract is within the statute of frauds, and cannot be enforced. If simply a passway over the land sold had been reserved by the deed, then, of course, this question would not arise; but the right is claimed to a passway through other land belonging to the appellant. Equity, following the law, will not enforce a contract within the statute. Here, however, it has been executed upon the part of the appellee, and the appellant accepted the deed and had it recorded. There is no offer by him to rescind. He placed the appellee in the use of the passway, while he is in possession of the property; and a court of equity will not, under these circumstances, permit him to hold it, and yet refuse to pay for it. If he declines the one, he must do the other; otherwise the statute would become a means of injustice, and enable a party to commit a fraud, thus defeating the very object of its enactment."

In this case defendants retain the title conveyed by complainant to Jane Lamb. They do not offer to rescind the contract, but seek to retain all its advantages, and at the same time repudiate all obligations under it. The statute of frauds was passed to prevent frauds, and it ought not to be so applied as to perpetrate a fraud. If there is such a variance between the case stated in the bill and the proofs as to prevent justice being done, I think it a proper case to permit an amendment of the bill.

The decree of the court below should be affirmed, with costs to the complainant.

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PEOPLE *v.* HAMMOND.

1. CRIMINAL LAW—SOLICITING BRIBE.
   The solicitation of a bribe by a member of the legislature is a complete common-law offense, though the person solicited refuses to co-operate.

2. SAME—INDICTMENT—STATEMENT OF OFFENSE.
   An indictment charging that respondent, while acting as a legislator, did, at a certain time and place, corruptly solicit a certain person to give him a sum of money, with intent to influence his vote upon a bill pending in the house of representatives, is not defective for being argumentative, and failing to state the means or words used in soliciting.

3. TELEGRAMS—SECONDARY EVIDENCE.
   Parol testimony is admissible to prove telegrams where it appears that the telegraph company has destroyed the originals.

4. SAME—PRESUMPTIONS—PERFORMANCE OF DUTY.
   It will be presumed that those in charge of receiving and transmitting telegrams perform the duties intrusted to them.

5. SAME—ANSWERS AS EVIDENCE.
   Where the original telegram has been destroyed by the company, a telegram received as and purporting to be an answer is admissible in evidence.

6. WITNESSES—INDORSEMENT OF NAMES ON INDICTMENT.
   The failure of the foreman of the grand jury to indorse the name of a witness upon an indictment is not sufficient reason for excluding his testimony, where respondent has had fair notice that the witness will be sworn.

7. CRIMINAL LAW—ARGUMENT OF PROSECUTOR—FAILURE OF RESPONDENT TO TESTIFY.
   A statement by the prosecuting attorney in his argument to the jury, that the people's witnesses stand undisputed, does not infringe the rule forbidding the prosecutor to comment on the fact that the respondent was not made a witness.

8. SAME—CHARGE OF COURT.
   A statement by the prosecutor that "defendant's counsel, when he said the people's witnesses and God were the only ones who knew the contents of the telegrams, forgot his client, whom

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it is alleged the telegrams were sent to, and who it is claimed sent one of them," was not error, where the court charged the jury that the fact that respondent did not take the stand in his own behalf should not weigh against him. MOORE, J., dissenting.

Exceptions before judgment from Ingham; Wiest, J. Submitted June 5, 1902. (Docket No. 99.) Decided March 23, 1903.

D. Judson Hammond was convicted of soliciting a bribe. Affirmed.

Henry M. Zimmermann and *William D. Gordon* (*R. A. Montgomery*, of counsel), for appellant.

Horace M. Oren, Attorney General, and *Arthur J. Tuttle*, Prosecuting Attorney (*Watts S. Humphrey*, of counsel), for the people.

MONTGOMERY, J. The respondent was convicted under an indictment which, after reciting that he was duly elected and qualified as a member of the legislature, and that a certain measure was pending before the legislature, charges the offense as follows:

"While said bill was still pending in and before said house of representatives as aforesaid, and on, to wit, the 23d day of May, A. D. 1899, at, to wit, the county and State aforesaid, the said D. Judson Hammond, so being such legislative officer, sitting and acting as such, well knowing the premises, and that he would be called upon in his official capacity to give his vote, opinion, and judgment upon the said senate bill No. 261, file No. 49, and contriving and intending to betray the confidence and trust reposed in him as such legislative officer, did corruptly solicit one James Coye to corruptly give him, the said D. Judson Hammond, so being such legislative officer as aforesaid, and while he was sitting and acting as such, a certain gift and gratuity of a certain sum of money, to wit, five hundred dollars in money, of the value of five hundred dollars, with intent to influence his, the said D. Judson Hammond's, act, vote, opinion, decision, and judgment on a certain matter, question, cause, and proceeding then pend-

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ing before the said house of representatives, and which might by law and was liable by law to come and be brought before him, the said D. Judson Hammond, in his official capacity as such representative as aforesaid, to wit, on the said senate bill No. 261, file No. 49, entitled as aforesaid."

The case is brought here for review before sentence.

1. It is strenuously contended that the indictment charges no offense known to the laws of this State. It is conceded by the learned counsel for the State that there is no statute defining the offense set out in the indictment, but it is contended that the case falls within the statute (3 Comp. Laws, § 11795) providing for the punishment of offenses indictable at the common law. In other words, it is claimed that the indictment sets out an offense at the common law. Respondent's counsel assert that solicitation to commit a crime is not indictable when there is interposed between the solicitation on the one hand and the proposed illegal act on the other the resisting will of another person, which other person refuses assent and co-operation; citing, among other cases, *McDade* v. *People*, 29 Mich. 50, and *Smith* v. *Com.*, 54 Pa. St. 209 (93 Am. Dec. 686).

It may be accurate to say that what is treated in the law as an *attempt* to commit a crime is not complete where there is interposed between the solicitor and the consummation of the completed offense the resisting will of the one whom the solicitor seeks to employ as the active agent. But to say that a solicitation may not amount to an offense under these circumstances is to deny that a solicitation to commit a felony is punishable at the common law as a substantive and completed offense. Can this be properly asserted?

In 1 McClain, Crim. Law, § 220, it is stated:

"The form of intent which perhaps involves the least degree of criminality is that of a solicitation of another to do an act which, if done, would constitute a crime; and such solicitation is generally held to be punishable as a misdemeanor, although the offense solicited is never committed."

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Mr. Wharton states the rule differently, as follows:

"Are solicitations to commit crime independently indictable? They certainly are, as has been seen, when they in themselves involve a breach of the public peace, as is the case with challenges to fight and seditious addresses. They are also indictable when their object is interference with public justice, as where a resistance to the execution of a judicial writ is counseled, or perjury is advised, or the escape of a prisoner is encouraged, or the corruption of a public officer or a witness is sought, or invited by the officer himself." 1 Whart. Crim. Law, § 179.

The precise question here involved was decided in *Walsh* v. *People*, 65 Ill. 58 (16 Am. Rep. 569). The opinion of the court is well reasoned, and, as we think, unanswerable. It was there held that requesting a bribe should be treated as an inciting to offer one, and hence a solicitation to commit an offense. It is clear that under our statute the offer of a bribe is not only an offense, but a felony. 3 Comp. Laws, § 11311. We are cited to *Hutchinson* v. *State*, 36 Tex. 293, which is opposed to *Walsh* v. *People*. But the *Hutchinson Case* is not reasoned, nor are the authorities reviewed. The case of *Com.* v. *Randolph*, 146 Pa. St. 83 (23 Atl. 388, 28 Am. St. Rep. 782), is an instructive case on this subject, and not only distinguishes *Smith* v. *Com.*, 54 Pa. St. 209 (93 Am. Dec. 686), cited by respondent's counsel, but sustains the text of Wharton above cited. See, also, *Com.* v. *Flagg*, 135 Mass. 545.

2. It is contended that the indictment is argumentative. The substance of the indictment is quoted above. We think it not open to the objection raised. It is not necessary that the indictment set forth the testimony. The form adopted is quite as full as that given in 1 Archb. Crim. Pr. & Pl. 20, or as that upon which a conviction was had in *Rex* v. *Higgins*, 2 East, 5.

3. The evidence of the prosecution tended to show that, in a conversation had with one James A. Coye in the capitol at Lansing, the respondent, in effect, proposed to kill the bill then pending before the legislature and men-

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tioned in the indictment, if paid $500. The prosecution further proved by parol that on his return to Grand Rapids Mr. Coye sent a dispatch to respondent by telegraph, reading substantially:

"Your proposition staggers my friends. They will communicate with their associates. Is your proposition the very least that you will take? Answer."

It was also proved by parol that, within a short time after this dispatch was sent, a reply was received, purporting to be sent by the respondent, and reading, "The very least, and must have answer quick." It was objected to this testimony that proper foundation was not laid for the introduction of parol testimony, and that there was no testimony to connect the respondent with the second telegram, or to show that he was the sender of it. As to the first objection, we think it sufficiently appeared that the original telegrams were destroyed by the company long before the trial, and that it follows that secondary evidence was admissible.

Whether the telegram purporting to be an answer to the one sent by the witness Coye was admissible without direct proof that it was sent by the respondent is a question by no means free from doubt. The authorities are not agreed, and, as the question is presented to the court for the first time, it must be determined upon principle. In *Howley* v. *Whipple*, 48 N. H. 487, which is the leading case supporting the contention of respondent's counsel, it was held that the fact that a telegram purported to be an answer to one sent was not sufficient to admit it in evidence. In that case the court held that the original signed message was the best evidence, and it would appear from a reading of the report of the decision that it was not shown that this original was destroyed. This case was, however, followed, and the same ruling made, in a case where it was shown that the original was destroyed, in *Smith* v. *Easton*, 54 Md. 138 (39 Am. Rep. 355). It was there held that evidence of the handwriting of the

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original message, or at least of its delivery to the first operator, is essential.

On the other hand, courts of equal respectability have likened telegrams to letters, and have held that purported answers are admissible as *prima facie* evidence. It is well settled that when a letter is received in due course of mail, purporting to be in response to the letter previously sent by the receiver, it is presumptively genuine and admissible. *Armstrong* v. *Thresher Co.*, 5 S. Dak. 12 (57 N. W. 1131); *People's Nat. Bank* v. *Geisthardt*, 55 Neb. 232 (75 N. W. 582); *Melby* v. *Osborne*, 33 Minn. 492 (24 N. W. 253); 1 Greenl. Ev. § 573*a*; 2 Whart. Ev. § 1328. The principle upon which these cases rest is that there is a presumption that those in charge of receiving and transmitting mail perform the duties intrusted to them, and this, coupled with the fact that the letter received on its face purports to be a reply to the one sent, and coming from the source from which it might be expected, raises a just inference that it is in fact a reply. We see no good reason why this same presumption of the performance of duty should not obtain as to the employés of a telegraph company. A large portion of the business of the country is transacted through the medium of such agencies, and, while it is true that mistakes sometimes occur, it is also true that the postal service is not infallible. It was held in *Com.* v. *Jeffries*, 7 Allen, 556 (83 Am. Dec. 712), that there is a presumption that when a telegram has been delivered to the telegraph company, and accepted by the operator for transmission, it is duly forwarded and received by the addressee. If this presumption obtains, what is to be inferred from the receipt of an answer to such a communication? Is it any less strong than is the receipt of an answer by mail to a letter? We think it is no stretch to say that a presumption arises that such answer was in either case sent by the original addressee. This was held in the recent well-considered case of *Western Twine Co.* v. *Wright*, 11 S. Dak. 521 (78 N. W. 942, 44 L. R. A. 438). We are satisfied with the reasoning of

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this case and follow it. See, also, *Taylor* v. *Steamer Robert Campbell*, 20 Mo. 254.

4. Witnesses whose names were not indorsed upon the indictment were sworn, against the objection of respondent's counsel. Two of these witnesses were not sworn before the grand jury; one was, but his name was inadvertently omitted from the indictment. The statute (3 Comp. Laws, § 11893) provides for the presenting to the court by the foreman of the grand jury of the indictment, with the names of the complainant and all the witnesses indorsed on the back thereof. The duty of indorsing names of witnesses upon an *indictment* is not imposed upon the prosecuting attorney, except as it is made his duty to attend upon the grand jury and prepare indictments. See *Hill* v. *People*, 26 Mich. 496. Section 11934, 3 Comp. Laws, relates to informations, and contemplates that the prosecuting attorney shall indorse on the information, at the time of filing the same, the names of all witnesses then known to him. It was held in *People* v. *Howes*, 81 Mich. 396 (45 N. W. 961), that the fact that the name of a witness known to the prosecuting attorney was inadvertently omitted did not authorize the prosecuting attorney to make the indorsement on the trial. In the present case, the proceeding being by indictment, no indorsement by the prosecuting attorney was proper after the indictment was filed. Should the failure of the foreman to make the indorsement be held to exclude the testimony wholly? True, it ought not to be permitted that the respondent be taken by surprise, but, if the respondent has fair notice of the purpose to use such witnesses, we think the spirit of the statute is complied with. Such notice was given in this case.

5. Some questions are raised as to the admission of testimony offered by the prosecution and the rejection of testimony offered on behalf of the respondent. We have given careful attention to the arguments of respondent's counsel upon this branch of the case, but we are not satisfied that any error was committed in either respect.

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6. Complaint is made of the argument of the prosecuting attorney, and it is claimed that it infringed the rule of the statute which forbids comment by the prosecutor upon the fact that the respondent is not made a witness. The substance of the prosecutor's argument was that the testimony of the people's witnesses stood undisputed. This, we think, is not open to just criticism. It is true that, in addition to this statement, counsel, in closing the case to the jury, said:

"Defendant's counsel, when he said that the people's witnesses and God were the only ones who knew the contents of the telegrams, forgot his client, whom it is alleged the telegrams were sent to, and who it is claimed sent one of them."

This argument appears to have been directly in response to a statement by respondent's counsel. We are not, therefore, prepared to hold that it was error, particularly in view of the fact that the jury were instructed that the fact that the respondent did not take the stand in his own behalf should not weigh against him in any manner.

The charge of the court fully and fairly submitted the case to the jury, and we think is not open to just criticism.

The conviction will be affirmed, and the court below directed to proceed to sentence.

HOOKER, C. J., and GRANT, J., concurred with MONTGOMERY, J.

MOORE, J. (*dissenting in part*). As stated by Justice MONTGOMERY, the authorities are not agreed as to whether the indictment charges an offense known to the laws of this State, nor are they agreed as to the admissibility of the telegrams without first showing that Mr. Hammond sent them. I agree with him that the weight of authority and the better reasoning sustain his disposition of these two questions; but I cannot agree with him in his conclusion that the argument of the prosecuting officer was not harmful. The record discloses the following:

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"Now, speaking of the telegrams, I want to call your attention—and I should not call your attention to this fact if it had not been for the gentleman who represents the defendant in this case making the assertion. He says that those men took the stand, and testified to the substantial contents of those telegrams. He said he should argue to you that there was no use disputing it, because he said they alone and God are the only ones who know what was in the telegrams; they and God alone are the only ones that know. My brother forgot his client, whom it is alleged the telegrams were sent to, and who it was alleged sent one of them.

"*Mr. Zimmermann:* I take an exception to that remark.

"*Mr. Humphrey:* I am simply answering the argument he made, which is not a true statement of the evidence in the case, and the jury know to the contrary, and know that the argument made by the gentleman is not true.

"*Mr. Gordon:* I desire to enter a formal exception to the argument of counsel, who are stating that some one besides the witness and God Almighty knows about the telegrams, and calling the attention of the jury to the fact that my client, the defendant, possibly does, and presuming his guilt; and I take an exception to the remark of counsel.

"*Mr. Humphrey:* If I said any such thing, I have simply said it in answer to their argument when they say that these men and God Almighty are the only ones that know the contents of that telegram; that if the evidence is true, and those telegrams were sent, there is another man knows."

The plea of not guilty interposed by defendant made it the duty of the people to prove his guilt beyond a reasonable doubt, and it is difficult to see how this could be done in this case without showing by proof beyond a reasonable doubt that Mr. Hammond wrote and sent the telegrams. His plea denied that he had done so. The argument of the counsel is based entirely upon the assumption that Mr. Hammond had knowledge of these telegrams, and the only possible purpose of making the statement was to call the attention of the jury to that fact, and that Mr. Ham-

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mond did not state what he knew about it, and that he would do so if the inference drawn by the counsel from the evidence offered on the part of the people was not true. The circuit judge did not at once say the argument of counsel was contrary to the provisions of the statute, but left the effect of the argument with the jury until he gave them his charge. The statute (3 Comp. Laws, § 10211) which authorizes one accused of crime to be a witness has this proviso:

"*Provided*, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect."

This language is not ambiguous. The argument of counsel is not excusable upon the ground that his zeal has led him to draw inferences from the testimony not warranted by it, the effect of which has been at once corrected by the circuit judge, but it called the attention of the jury to the fact that accused was not sworn, and the statute says this shall not be permitted. The mischief done to the accused in the minds of the jurors by such an argument cannot be repaired by giving a written request to charge, any more than you can cure the effect of throwing into the air a handful of thistle down by attempting to pick up the seeds. I do not see how the case can be distinguished from the recent case of *People* v. *Payne*, 131 Mich. 474 (91 N. W. 739).

For the reason stated, the verdict should be set aside, and a new trial ordered.

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FROHLICH *v.* MITCHELL.

1. TRANSCRIPT JUDGMENT—AFFIDAVIT—CLERICAL ERROR.
   A transcript judgment is not void because the attorney making the affidavit stated that the judgment was rendered in favor of "deponent," instead of the "plaintiff," where the affidavit was properly entitled in the cause, and showed who the plaintiff was in whose favor the judgment must have been rendered.
2. SAME—AMOUNT DUE.
   A statement in such affidavit that the amount due was due to the deponent is not a jurisdictional defect, as 1 Comp. Laws, § 846, only requires the amount due on the judgment to be stated.

Certiorari to Wayne; Frazer, J. Submitted October 8, 1902. (Docket No. 18.) Decided March 23, 1903.

William Mitchell petitioned the circuit court to vacate a transcript judgment entered against him by Edward Frohlich. From an order denying the petition, Mitchell brings *certiorari*. Affirmed.

Jonathan Palmer, Jr., for appellant.

Wilkinson & Younglove, for appellee.

HOOKER, C. J. The following affidavit is the basis for the issue and filing of a transcript, the entering of judgment in the circuit court, and the issue of execution thereon, viz.:

"EDWARD FROHLICH, Doing Business as the Edward Frohlich Glass Co., "*vs.* "WILLIAM MITCHELL.	Before John B. Teagan, One of the Justices of the Peace in and for the County of Wayne.

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"STATE OF MICHIGAN,
County of Wayne,
City of Detroit. } ss.

"Ralph B. Wilkinson, one of the attorneys for the above-named plaintiff, being duly sworn, says there is now due and remaining unpaid upon the judgment heretofore, on the 4th day of May, 1901, rendered in the above-entitled cause by the above-named justice in favor of this deponent against the above-named defendant, the sum of four hundred and twenty-four 65-100 dollars, exclusive of costs, and that there is now due to this deponent for the costs taxed in said cause by said justice upon the rendition of said judgment the further sum of five dollars, and that execution may now be issued upon said judgment for the collection thereof; and this deponent further says that he has good reason to believe, and does believe, that there is not sufficient goods and chattels liable to execution to satisfy said judgment within the county of Wayne, where said judgment was rendered, belonging to the said William Mitchell, or to any person or persons against whom such execution may issue. And further says not.

"RALPH B. WILKINSON.

"Subscribed and sworn to before me this 11th day of May, A. D. 1901.

"WILLIAM TEAGAN,
"Clerk of the Justice Courts for Detroit."

After a levy and sale of real estate, counsel for the defendant appeared and made a motion to vacate the judgment and subsequent proceedings upon the ground that the affidavit filed conferred no jurisdiction upon the justice to return the transcript, or upon the county clerk to file the same or enter judgment. This motion was based upon an affidavit setting up the facts, and the point relied upon was that the affidavit for the transcript did not state that a judgment was rendered in favor of the plaintiff, and did state that it was rendered in favor of "the deponent," who was therein stated to be the plaintiff's attorney, and that the amount named was due to the deponent instead of the plaintiff. The motion was denied, and the proceeding is here upon *certiorari*.

Three points are made by plaintiff's counsel in support of the proceedings:

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1. That the affidavit is a substantial, and therefore a sufficient, compliance with the statute.
2. That the defendant has, through laches, waived any right of objection to the proceeding.
3. That *certiorari* is not a proper method for reviewing the proceedings.

The affidavit is entitled in the cause, showing that Frohlich was the plaintiff, and it states that affiant is attorney for the "plaintiff above named." The affidavit shows that the statement that "judgment was rendered in favor of the deponent" was erroneous, and shows who the plaintiff was in whose favor it must have been rendered. This is evidently a clerical error, and was properly disregarded.

The statement that the amount due was due to the deponent is unimportant. The statute (1 Comp. Laws, § 846) does not require more than that the amount due upon the judgment shall be stated. This affidavit may be made on behalf of the plaintiff or an assignee, and in either case the entry of the transcript judgment would be under its original title. The affidavit purports to be made by affiant in the capacity of attorney, and his statement that the amount due is due to deponent may be disregarded.

The judgment is affirmed, with costs.

MOORE, GRANT, and MONTGOMERY, JJ., concurred.

CLARKE *v.* HILL.

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MANDAMUS—TRANSFER OF STOCK.

Mandamus will not be granted to compel the secretary of a private corporation to record the transfer of certificates of stock on the books of the company, as equity has jurisdiction to decree transfers, if an action at law does not afford an adequate remedy.

Certiorari to Wayne; Brooke, J. Submitted October 8, 1902. (Docket No. 9.) Decided March 23, 1903.

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Mandamus by Ira M. Clarke to compel William H. Hill, secretary of the W. H. Hill Company, to transfer certain shares of stock. From an order granting the writ, respondent brings *certiorari*. Reversed.

Corliss, Andrus, Leete & Joslyn, for relator.

Keena & Lightner, for respondent:

Cited, to the point that *mandamus* is not the proper remedy, *Kimball* v. *Water Co.*, 44 Cal. 173; *Tobey* v. *Hakes*, 54 Conn. 274 (7 Atl. 551); *Bank of Georgia* v. *Harrison*, 66 Ga. 696; *Stackpole* v. *Seymour*, 127 Mass. 104; *Baker* v. *Marshal*, 15 Minn. 177; *State* v. *Rombauer*, 46 Mo. 155; *State* v. *Loan Ass'n*, 43 N. J. Law, 389; *State* v. *Timken*, 48 N. J. Law, 87 (2 Atl. 783); *Shipley* v. *Bank*, 10 Johns. 484; *Ex parte Firemen's Ins. Co.*, 6 Hill, 243; *State* v. *Guerrero*, 12 Nev. 105; *Freon* v. *Carriage Co.*, 42 Ohio St. 30; *Durham* v. *Mining Co.*, 9 Or. 41–52; *Wilkinson* v. *Bank*, 3 R. I. 22.

HOOKER, C. J. Relator obtained a peremptory *mandamus* issued out of the circuit court requiring the respondent to transfer certain stock in a private corporation to the relator upon the books of the company. The learned circuit judge was of the opinion that, while there were other remedies, inasmuch as he was able to say that the right to the stock was clear, the writ should issue.

Mandamus is an extraordinary remedy, and is recognized as such. We have often held that it is inappropriate where there is another adequate remedy in law or in equity; and, as it is never supposed to be issued where there is not a clear legal right, it can hardly rest upon the ground that the right is undisputed. The authorities are overwhelming in support of respondent's contention that this is not a proper remedy here. As they are cited in respondent's brief, we need not cite them, or discuss them further than to say that most of the cases cited by relator's counsel are distinguishable on well-recognized grounds. Equity has complete jurisdiction to decree transfers, if an action at law is not an adequate remedy. 2 Thomp. Corp.

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§ 2425 *et seq.* See, also, section 2445. To sustain the jurisdiction contended for would be to make the summary remedy by *mandamus* the substitute for an action or suit in a large class of cases.

The order is reversed, with costs, and the writ is denied.

MOORE, GRANT, and MONTGOMERY, JJ., concurred.

FARRAND *v.* KAVANAUGH.

1. EJECTMENT—PARTIES—TITLE.
   Notwithstanding, by statute (8 Comp. Laws, § 10950), the question of title, set up by one not in possession, may be tried in an action of ejectment, it is still a possessory action, and the person in possession is a necessary party.

2. SAME—AMENDMENT—WAIVER.
   A defendant in an action of ejectment, who objects to an amendment to the declaration adding another as a defendant, but afterwards accepts the costs awarded at the time the amendment and continuance were granted, waives the objection.

3. SAME—JURISDICTION—WAIVER—PARTIES.
   A defendant in an action of ejectment, who appears and pleads to the merits, waives any objection to the jurisdiction of the court based on the ground that he was made a party by an amendment to the declaration.

Case made from Branch; Yaple, J. Submitted October 8, 1902. (Docket No. 14.) Decided March 23, 1903.

Ejectment by Olivia C. Farrand against Francis Kavanaugh and Morris Kavanaugh. There was a judgment for plaintiff, and defendants assign error. Affirmed.

Reynolds & Reynolds, for appellants.

John B. Shipman and *Mark S. Andrews*, for appellee.

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HOOKER, C. J. The land in dispute is a strip 2 rods in width, and is alleged to be the west portion of an 80-acre lot described in the declaration. The action is ejectment, brought by the owner of the 80-acre parcel to recover the strip from the owner and occupant of an adjoining parcel. Said owner is Francis Kavanaugh, and when the action was commenced he was the sole defendant. The introduction of the plaintiff's proof developed the fact that he purchased and owned the farm adjoining the land of the plaintiff, but that his son had gone upon the land at the time of the purchase by his father, and had occupied it thereafter up to the time of trial, together with the disputed strip. Thereupon counsel for the plaintiff moved to amend the declaration by making the son, Morris Kavanaugh, a party defendant, which motion was granted, and the amendment made, upon payment of $60 costs to defendant Francis Kavanaugh, and the cause was continued. Counsel for Francis Kavanaugh accepted and receipted for the costs for witness fees expended at said term, and Morris Kavanaugh came in and filed a plea of the general issue. Upon the trial the plaintiff recovered, and the only question before us is whether the court had jurisdiction to permit the amendment to the declaration, making Morris Kavanaugh a party.

It is fundamental that ejectment is a possessory action, and at common law lay only against the party in possession. Our statute (3 Comp. Laws, § 10950) permits it to be used to try the question of title set up by one not in possession, but in such case the person in possession, if there be such person, is a necessary party. *Lockwood* v. *Drake*, 1 Mich. 14; *Crane* v. *Seitz*, 30 Mich. 453; *Hoyt* v. *Southard*, 58 Mich. 432 (25 N. W. 385); *Haddy* v. *Tobias*, 85 Mich. 326 (48 N. W. 499). The jurisdiction of the court over Francis Kavanaugh was clear, though, under the testimony that one not made a party was in possession, the plaintiff might not have been able to recover. To say that for that reason the court had no jurisdiction, and its proceeding was void, would be to

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make the question of jurisdiction depend upon the proof adduced upon the trial. See *Peninsular Sav. Bank* v. *Ward*, 118 Mich. 98 (76 N. W. 161, 79 N. W. 911).

The important questions before us are: *First*, is the judgment erroneous against Francis for the reason that Morris was made a party defendant? And, *second*, is it erroneous as to Morris? This action was begun by declaration, and before judgment the trial was abandoned, and an order taken by plaintiff permitting her to bring in another and a proper party. A new declaration was filed, in which both were named as defendants, and this was served on Morris, and perhaps upon both. Thereupon Morris pleaded the general issue, and Francis having received some $60 costs, payment of which was a condition of the amendment, the parties proceeded to trial; no objection being made by either. It has been supposed that, as a general rule, new parties cannot be brought in by amendment in actions of tort; but we have no doubt that it might always have been done by stipulation, and that, where there is a clear waiver of objection, an irregularity in bringing them in is waived.

In this case Morris Kavanaugh did not plead in abatement. On the contrary, he pleaded to the merits and went to trial; and the point was not raised on his behalf until after judgment, though he employed the same attorneys who were already conducting his father's defense. On the other hand, while Francis opposed the amendment, he afterwards accepted payment of the costs under the order, and went to trial without further objection. It is true, as counsel state, that he could not review the order until after final judgment (see *St. Clair Tunnel Co.* v. *St. Clair Circuit Judge*, 114 Mich. 417 [72 N. W. 249]); but the point was, like many other interlocutory questions, subject to waiver. Thus one who pleads in abatement must usually stand on the judgment, and he cannot plead to the merits without waiving his objection to the jurisdiction. In the present case the defendant Francis Kavanaugh saved the point when the order was made, but by

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afterwards accepting payment under the order he waived it. Counsel for the defendant admit the rule, but urge that this case falls within a recognized exception, viz., that, where the benefit taken could not be affected by a reversal of the judgment or order, the appeal is not waived. To bring this case within the exception, we must be able to say that, in any event, the defendant must necessarily recover the costs of the first trial. If this amendment was erroneous, the plaintiff would still be entitled to try her case against Francis Kavanaugh. Defendant's right to these costs would depend on the result, and that result would, in turn, be affected by the proofs regarding the alleged possession of Morris. We cannot say that the plaintiff is concluded by the testimony on the first trial, nor by the motion to amend, which may have been a precautionary measure. It becomes unnecessary to decide whether a new party may be brought in by amendment in such a case as this, against objection, and we express no opinion upon it.

The judgment is affirmed.

MOORE, GRANT, and MONTGOMERY, JJ., concurred.

BARRON v. MERCURE.

CONVEYANCES—POSSESSION OF DEED—PRESUMPTION OF DELIVERY. The presumption of the delivery of a deed, arising from its production by the grantee, was, in this case, overcome by evidence showing that it was not delivered when signed, nor for five years thereafter, that a companion deed could not be produced, and that the grantee, after the death of the grantor, made contradictory statements concerning the delivery, and inconsistent with his claim of title.

Appeal from Wayne; Carpenter, J. Submitted October 9, 1902. (Docket No. 26.) Decided March 23, 1903.

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Bill by Philimen Barron and others against Joseph Mercure and another to remove a cloud from title. From a decree for complainants, defendants appeal. Affirmed.

E. R. Gilday, for complainants.

Lehmann & Riggs, for defendants.

MONTGOMERY, J. Complainants and defendants are the heirs at law of Octave Mercure and his wife, Julian Mercure. This bill is filed to remove a cloud on the title to 18 acres of land formerly belonging to Octave Mercure. December 7, 1894, Octave Mercure owned the land in question, and also a house and lot in the township of Brownstown. On that date he executed deeds of both these descriptions of land to his wife, Julian. She in turn signed two deeds, the one conveying the house and lot to a daughter, Emma Roberts, and the other conveying the 18 acres to defendant Joseph. It is undisputed that these last-named conveyances were retained in the custody and control of Mrs. Julian Mercure or her husband for some years, and were certainly not delivered prior to 1899. The deed to Joseph was recorded shortly after his mother's death, in 1900. The deed to Mrs. Roberts was never delivered, and was not found among the effects of Mrs. Mercure. The sole question in the case is whether the deed to Joseph was delivered to him in the mother's life-time. The circuit judge found that it was not, and granted the relief prayed.

The defendants' counsel insist that the presumption of delivery arising from the fact that Joseph produces the deed has not been overcome. We think otherwise, and agree with the conclusion of the circuit judge. It appears that, for some potent reason, the deed was not delivered when signed, and that its companion deed to Mrs. Roberts is not produced nor accounted for, except on the theory that it was destroyed. It appears that Joseph, after his mother's death, has made contradictory statements as to the circumstances of the claimed delivery, and has made

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statements as to the title wholly inconsistent with his present claim. Enough appears to convince us that there was never a delivery of this deed.

The decree is affirmed, with costs.

HOOKER, C. J., MOORE and GRANT, JJ., concurred.

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BURNS v. BURNS.

1. WILLS—LEGACY FOR LIFE—POSSESSION OF LEGATEE.
   Under a will giving the property of the testator to his executor, to the intent that his wife should have the full use, benefit, and enjoyment of it for her life, with the remainder after her death to his children, the personal representative of the testator may recover from the wife the amount of money belonging to the estate, and in her possession at the time of the death of the testator. *Hull* v. *Hull*, 122 Mich. 338.

2. GIFT INTER VIVOS—JOINT CONTROL OF BANK ACCOUNT.
   A man had an account with a bank, which was so arranged that his wife could draw the money as well as himself. He told the bank teller it was as much her money as his. At the time of executing his will, he said the money in the bank belonged to his wife; that she had the same control over it that he had. *Held*, that the testimony did not indicate that he had ever deprived himself of authority over the fund, and therefore did not show a gift *inter vivos*.

3. HUSBAND AND WIFE—AGENCY OF WIFE—TERMINATION.
   The authority given a wife to use her husband's money is terminated by his death.

Error to Wayne; Donovan, J. Submitted October 9, 1902. (Docket No. 32.) Decided March 23, 1903.

Assumpsit by John Burns, administrator, with the will annexed, of the estate of Michael Burns, deceased, against Anne Burns, for money had and received. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

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Alexander Brown (*Fred J. Cochran*, of counsel), for appellant.

Flynn & Sevald (*Charles K. Latham* and *Everett B. Latham*, of counsel), for appellee.

HOOKER, C. J. Michael Burns was, during his life, a depositor in the Detroit Savings Bank. The testimony of its teller shows that as early as March 14, 1893, he had a balance of $7,250. This balance was transferred on March 14, 1893, to another pass-book, showing a credit to Burns of $7,259.72. This account was closed on July 5, 1900, and a balance of $6,323.22 then appeared to the credit of Michael Burns. When the last mentioned pass-book was issued, it was taken away and afterwards kept by Michael Burns. He made withdrawals of money from time to time, and allowed his wife, Anne Burns, to do the same. The teller testified that by verbal order of Michael he put her name on the book opposite his name, corresponding to his number, so that she would have the right to draw from that account. "He told me to fix it so that he or she could draw it at any time; that it was as much her money as it was his money. The balance, when the account was closed out, July 5th, was $6,323.22 due from the bank to Michael Burns." On that day Mrs. Burns came to the bank, and stated that Michael was at the hospital, sick, and that the doctors said that they thought it unlikely that he would get well. The teller asked her whether, in that event, she could get this money, and told her that a better way for her to do would be to put this money in her name, as she had a right to draw it at any time, and she said that, if he (the teller) thought it would be a better way, she would do it. It was thereupon closed out, and the amount transferred to an account opened in her own name, and she took the new pass-book.

Burns died December 8, 1900. He left a widow, Anne Burns, and six children. He also left a will, which purports to have been made May 17, 1899. This provided:

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First. For payment of debts and funeral expenses.

"*Second.* I give, devise, and bequeath all my property and effects, of every name and nature, to my executors hereinafter named, for the intents and purposes hereinafter mentioned, viz.: I desire that my wife shall have the full use, benefit, and enjoyment of all my property and effects, of every name and nature, for and during the full term of her natural life."

"*Sixth.* Whatever remains after my wife's death I desire shall be divided share and share alike between my beloved children, John Burns, Patrick Burns, Julia Crapo, Maria Guyman, Kate Fahey, and my adopted child, Mary Burns.

"*Seventh.* I hereby appoint my beloved wife, Anne Burns, and Mr. Charles Collins, of the Wayne County Savings Bank, Detroit, sole executors of this, my last will and testament."

John Burns, one of testator's sons, was appointed administrator with the will annexed, and brought this action to recover the amount of said deposit from his mother. A verdict in his favor was directed, and the defendant has appealed.

It is not denied that this was at one time the money of Michael Burns. One Schmiel was called as a witness for the defendant, and he testified that, at the time the will was executed, Mr. Burns was asked by the notary what he was going to do with the money in the bank, and replied: "That belongs to my wife; it is already settled." Morgan J. P. Dempsey testified that he was Burns' spiritual adviser, and that, just prior to the execution of the will, he told him that the money was in the joint name of himself and wife, and that his wife had the same control over that money that he had, and that it was his intention that it should be at her control.

Counsel for the defendant contend for a reversal of the judgment on the following grounds:

1. Because, under the will, the money was given to the wife for her lifetime, and under the law she was entitled to its custody and control.

2. That the money had been given to the wife during her husband's lifetime, and was no part of testator's estate.

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Counsel for the plaintiff call our attention to section 9294 of the Compiled Laws, which provides:

"(9294) SEC. 34. All the devisees and legatees who shall, with the consent of the executor or otherwise, have possession of the estate given to them by will before such liability shall be settled by the probate court, shall hold the same subject to the several liabilities mentioned in the preceding section, and shall be held to contribute according to their respective liabilities to the executor, or to any devisee or legatee from whom the estate devised to him may have been taken for the payment of debts or expenses, or to make up the share of a child born after the making of the will, or of a child or the issue of a child omitted in the will; and the persons who may, as heirs, have received the estate not disposed of by the will as provided in this chapter, shall be liable to contribute in like manner as the devisees or legatees."

Manifestly, if the plaintiff is right in his claim that the will gives the property to the custody of the administrator to be held in trust, there would be no opportunity for the application of the statute, because of the clear intent that the defendant should not have it. We are of the opinion that it did not give the property outright to the wife, and that the case is ruled by *Hull* v. *Hull*, 122 Mich. 338 (81 N. W. 89), and *Cole* v. *Cole's Estate*, 125 Mich. 655 (85 N. W. 113).

We are also of the opinion that there was no proof from which a gift *inter vivos* can be inferred. The testimony does not indicate that the testator ever deprived himself of authority over the fund, and, while the testimony of Schmiel, Dempsey, and the bank teller tends to show an intention to allow her to use the fund, such authority was terminated by testator's death. The case of *Brown* v. *Brown*, 23 Barb. 565, is in point.

No error was committed in refusing a new trial.

The judgment is affirmed.

MOORE, GRANT, and MONTGOMERY, JJ., concurred.

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AVERY v. PRESTON NATIONAL BANK.[1]

1. RECEIVERS—EXECUTORS—CUSTODY OF TRUST FUNDS.
   Where a receiver has deposited trust funds in a bank in his own name, his executor is entitled to recover the same from the bank, for the purpose of delivering them to the receiver's successor, although the bank is interested in the fund.

2. SAME—CHANCERY JURISDICTION.
   The court of chancery that appointed the receiver must determine the disposition of the trust fund which is in its custody.

Error to Wayne; Donovan, J. Submitted October 10, 1902. (Docket No. 43.) Decided March 23, 1903.

Assumpsit by Elizabeth H. Avery, John H. Avery, and George E. Avery, executors of the last will and testament of Darius N. Avery, deceased, against the Preston National Bank, for money had and received. From a judgment for defendant on verdict directed by the court, plaintiffs bring error. Reversed.

Gray & Gray, for appellants.

Geer & Williams and *H. R. Martin*, for appellee.

HOOKER, C. J. The Clover Condensed Milk Company was a corporation. It was indebted to the defendant. Being embarrassed pecuniarily, three of its stockholders advanced $1,000 each, and two mortgages of its property were given in trust to Darius N. Avery to secure its indebtedness. All expenses of the trustee were to be paid first; second, the $3,000 advanced; third, the debt to the defendant; and, afterwards, various other claims, in the order therein named. The trustee took immediate possession of the property, and proceeded to carry on the business until the 1st of the succeeding November, a period of

[1] Rehearing denied September 22, 1903.

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about six months, when the property was sold. He deposited the proceeds with the defendant in his own name. The $3,000 loan was paid.

In November, 1898, a bill was filed in the Wayne circuit by the defendant, alleging the insolvency of the company; that the trustee had assets, including a claim then in litigation in New York; and that such litigation could be brought to an end more speedily through the appointment of a receiver. It prayed that a receiver be appointed to take charge of and collect the assets. Darius N. Avery was appointed such receiver, and it is claimed that the entire proceeding was with his approval.

Darius N. Avery died on May 2, 1899, without having rendered a final account as trustee or receiver; and on February 24, 1900, George E. Avery was appointed receiver, on a petition filed by himself and co-executors of Darius N. Avery. He filed a statement of account in the chancery case, and the matter was partially heard. Some dispute arose over some credits claimed by the receiver, and the hearing was continued for the purpose of securing further evidence, and it is still pending. The plaintiffs, as executors, afterwards demanded from the defendant payment of the amount deposited; and this was refused upon the claim that it was a trust fund, and really belonged to the bank. Thereupon this action was brought by the executors to recover it. The court refused to consider or admit evidence of the counterclaims, upon the ground that the court of chancery only had jurisdiction of the accounting, and directed a verdict for the defendant on the ground that this money constituted the fund of an unsettled trust in the control of a court of chancery, and that the executors had no right to recover it.

The plaintiffs claim:

1. That the transactions of the Condensed Milk Company should not have been admitted.

2. That, after they were admitted, the court should have allowed plaintiffs to show the trustee's disbursements and the true balance.

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3. That a verdict should not have been directed for the defendant.

4. That one should have been directed for the plaintiffs.

At the time of the death of Darius N. Avery, he had in his custody as receiver a fund which he had deposited with this defendant. This created the relation of debtor and creditor between them. It is true that the bank had an interest in the fund, but it had no right to appropriate it as its own until the court should make an order for its distribution. It was money in the custody of the law, as between the receiver and the bank, and the former, as between them, was entitled to it. But the present receiver never had its actual custody. It was among the assets of his predecessor, and he was entitled to demand and receive them from his executors; and, the fund being susceptible of identification, there is no doubt of the receiver's right to follow it and claim it if necessary. He had also the right to demand it of the representatives, and they had the right to take the fund and deliver it to him as its proper custodian. The defendant had no right to withhold it.

Counsel cite cases which are thought to support the defendant's right, as *cestui que trust*, to apply this fund to its claim. We can imagine cases where a *cestui que trust* might defend against an action brought against him by a trustee on the ground that he was entitled to the fund, as he might in some cases recover the trust fund in an action against a trustee. But, before he would be permitted to do either, it would be necessary that he have a right to the same. Here the officer of the court of chancery is the party claiming the fund. That court, and not a court of law, must first determine the disposition of the fund which is in its custody. We cannot try the questions involved in the accounting case. Some of the cases cited relate to the right to follow a trust fund where it can be identified against general creditors, but there is no such question necessarily involved here. No one disputes that this is such a fund, and subject to the control of the court

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of chancery. Presumably, the plaintiffs seek to get possession of it that they may turn it over to the receiver; thus discharging the liability of the estate in whose custody it is.

We are of the opinion that the court erred in directing a verdict for the defendant.

The judgment is reversed, and a new trial ordered.

MOORE and MONTGOMERY, JJ., concurred. GRANT, J., did not sit.

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VILLAGE OF DURAND *v.* BOARD OF SUPERVISORS OF SHIAWASSEE COUNTY.

1. HEALTH OFFICERS — COMPENSATION — CONTAGIOUS DISEASES — LIABILITY OF COUNTY.

   Under the statute (2 Comp. Laws, § 4424) providing that, in certain cases, the expense of a village board of health, in caring for persons sick with diseases dangerous to the public health, shall be a charge against the county, provided the board shall render an itemized statement of its expenses, a village cannot bind the county by voluntary donations to its health officer, over and above the charges preferred by him for specific services.

2. SAME—CONSTRUCTION OF STATUTE.

   The proviso to section 4424, 2 Comp. Laws, "that the health board shall keep and render an itemized and separate statement of expenses incurred in so caring for each person," is mandatory.

Certiorari to Shiawassee; Smith, J. Submitted October 17, 1902. (Docket No. 82.) Decided March 23, 1903.

Mandamus by the village of Durand to compel the board of supervisors of Shiawassee county to allow certain claims. From an order granting the writ, respondent brings *certiorari*. Modified.

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Byron P. Hicks, for relator.

Austin E. Richards, Prosecuting Attorney, and *John T. McCurdy*, for respondent.

MONTGOMERY, J. This is *certiorari* to review the action of the circuit judge in directing that a peremptory *mandamus* issue requiring the respondent to audit and allow two several claims in favor of the village, which claims consist, first, of an item of $520, allowed and paid by the village to Dr. A. G. Cowles, under a charge for "extra services as health officer during an epidemic of smallpox, from May 24 to July 14, 1900, 52 days, at $10 per day, $520." The other item directed to be audited is the sum of $157.75, for an allowance to Dr. Cowles for services during another outbreak of smallpox, consisting of various items. Of these items one is for $96 for "extra services as health officer from February 27 to March 14, inclusive, 16 days, at $6 per day." The remainder of this amount of $157.75 consists of an itemized account for services rendered to one William Lampman during the outbreak of smallpox.

Numerous questions are discussed in the briefs, but the case may be disposed of without discussing these questions in detail. The two different items for services as health officer stand upon the same footing, and at the threshold of the case we are met with the question as to whether these items should be allowed. The relator's counsel relies upon the case of *Village of St. Johns* v. *Board of Sup'rs of Clinton Co.*, 111 Mich. 609 (70 N. W. 131). In that case a similar allowance was made, and the action of the circuit court directing a *mandamus* was affirmed by this court. But, in construing this decision, dates are important. The epidemic of smallpox in that case occurred in 1894. At that time section 1647, 1 How. Stat., corresponding to section 4424 of the Compiled Laws of 1897, read as follows:

"When any person coming from abroad, or residing in any township within this State, shall be infected, or shall

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lately before have been infected, with the smallpox or other sickness dangerous to the public health, the board of health of the township where such person may be shall make effectual provision, in the manner in which they shall judge best for the safety of the inhabitants, by removing such sick or infected person to a separate house, if it can be done without danger to his health, and by providing nurses and other assistance and necessaries, which shall be at the charge of the person himself, his parents, or other persons who may be liable for his support, if able; otherwise, at the charge of the county to which he belongs."

But in 1895 there was added to the section the following clause:

"*Provided*, that the health board shall keep and render an itemized and separate statement of expenses incurred in so caring for each person." Pub. Acts 1895, Act No. 97.

It is very clear that the account does not conform to this requirement. It is suggested by the relator's counsel that this provision is directory to the board of health simply. We do not so regard it. The language of the clause is that of a proviso, and a proviso which affects the entire of the preceding section. The wisdom of the provision is well illustrated in this case. Dr. Cowles was a witness in the case, and testified that, as to the bill of $520, he had previously rendered a bill for specific services rendered in connection with this same outbreak of smallpox, and had received his pay therefor, and testified that the manner in which he came to present this $520 bill was that one of the councilmen, in open council, thought that he ought to have extra pay for services as health officer, and that this allowance was in the nature of a present to him for extra services in the matter; that he had not made any such claim against the village, but that the claim was presented at the suggestion of the members of the council, and by them allowed; that, if he had not been told to present the bill, he would not have presented it. However equitable the claim may have been as against the village, this statute certainly never contemplated that boards of

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health could bind the county by voluntary donations over and above the charges preferred by those having charge of these cases. The village has met the payment of this bill, and we see no reason why it should not bear the expense which was voluntarily incurred.

As to the remaining items of the bill of $157.75, they are the proper subject of allowance by the board of supervisors, and the order will be modified to the extent of directing the allowance of these items only.

We think the costs of this proceeding in this court should be borne by the relator. The proceedings in the circuit will be without costs to either party.

HOOKER, C. J., MOORE and GRANT, JJ., concurred.

ONTARIO POWDER WORKS v. POWELL.

PLEADING—AMENDMENT WITHOUT LEAVE—BILL OF PARTICULARS. Where a declaration on a foreign judgment, containing also the common counts, was amended without leave, after the time for amending without leave, by filing a declaration like the former, except that it contained a notice that certain promissory notes would be given in evidence, and on the same day a bill of particulars was filed, pursuant to defendant's demand, referring to the amended declaration for a description of plaintiff's cause of action, it was not error to treat the amended declaration as a part of the bill of particulars.

Error to Marquette; Stone, J. Submitted November 18, 1902. (Docket No. 93.) Decided March 23, 1903.

Assumpsit by the Ontario Powder Works against Daniel W. Powell and Edward Mitchell, copartners as Powell & Mitchell, on a foreign judgment and certain promissory notes. From a judgment for plaintiff on verdict directed by the court, defendants bring error. Affirmed.

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Clark & Pearl, for appellants.

Ball & Ball, for appellee.

HOOKER, C. J. Defendants have appealed from a judgment rendered against them. The action was commenced by declaration, which counted upon a foreign judgment. It contained the common counts also. On January 4th, defendants' counsel filed and served a plea of the general issue, and gave notice, by way of defense, that the judgment was not binding and conclusive in the cause. It also alleged that the foreign court had no jurisdiction. It concluded with a reiterated demand for a bill of particulars. Subsequently the plaintiff's counsel filed, without leave, an amended declaration, which was substantially like the former, except that it was accompanied by a notice that it would give in evidence certain promissory notes, copies of which were appended. On the same day a bill of particulars was filed, stating that the several judgments and notes mentioned in the amended declaration constituted plaintiff's entire cause of action. At the trial, objection was made to the amended declaration, upon the ground that it was filed without leave, and after the time prescribed by rule for filing amended declarations without leave. The court seems to have held that this objection was valid against the paper, but held that it might be used in connection with, and to make complete, the bill of particulars; or, in other words, that it might "be treated as a part of the bill of particulars" to the original declaration. We think there was no error in this.

Counsel urge that the notes recovered upon were merged in a former judgment rendered in Canada, but we discover nothing in the pleadings or evidence that this was so. They may have been distinct and separate claims, for aught that appears to the contrary. The testimony made a *prima facie* case, and the judgment is affirmed.

The other Justices concurred.

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AUSTIN v. AUSTIN.

PARTITION—DECREE—APPEAL.

A decree directing that a partition of lands be made cannot be reviewed on an appeal from the order confirming the report of the commissioners.

Appeal from Ottawa; Padgham, J. Submitted November 18, 1902. (Docket No. 85.) Decided March 23, 1903.

Bill by Henry F. Austin and others against Mary J. Austin, Robert C. Wallace, and others for the partition of certain real estate. From an order confirming the report of the commissioners, defendant Wallace appeals. Affirmed.

Charles E. Soule, for complainants.

Walter I. Lillie, for appellant.

MONTGOMERY, J. This is an appeal from an order confirming the report of commissioners in partition. The decree directing that partition be had was not appealed from, and is not before us for consideration. *Shepherd* v. *Rice*, 38 Mich. 556.

Appellant's counsel contends that the decision of the commissioners was so grossly inequitable as to amount to a legal fraud upon his client. An examination of the case convinces us that this claim is wholly unfounded. The decision appears to have been based upon considerations which seem sound, and to have been based upon the testimony, and the judgment of the commissioners, as to the value of the land, the timber, and the improvements, respectively. The record does not support the suggestion that the appellant was prevented from producing his testimony.

The decree is affirmed, with costs of this court to appellees.

The other Justices concurred.

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AUDITOR GENERAL *v.* BUCKEYE IRON CO.

TAXATION—BOARD OF REVIEW—RECORD.

The failure of the board of review to keep a record of its proceedings, as required by section 3856, 1 Comp. Laws, does not render invalid a tax against one who has suffered no injury by reason of such omission. 1 Comp. Laws, § 3922.

Appeal from Marquette; Stone, J. Submitted November 19, 1902. (Docket No. 95.) Decided March 23, 1903.

Petition by Perry F. Powers, auditor general, for the sale of land delinquent for taxes: On objections filed by the Buckeye Iron Company. From a decree for petitioner, defendant appeals. Affirmed.

Frank A. Bell, Prosecuting Attorney, for petitioner.

Clark & Pearl, for defendant.

MONTGOMERY, J. This case presents the single question whether the failure of the board of review to keep a record of its proceedings, as required by section 3856, 1 Comp. Laws, renders the tax spread upon the roll invalid as against one who has suffered no injury by reason of such omission; his own assessment, when disturbed at all, having been reduced.

We think this question should be answered in the negative, on the authority of section 3922, 1 Comp. Laws, which provides that:

"No tax assessed upon any property, or sale therefor, shall be held invalid by any court of this State on account of any irregularity in any assessment, or on account of any assessment or tax roll not having been made or proceeding had within the time required by law, or on account of the property having been assessed without the name of the owner, or in the name of any person other than the owner, or on account of any other irregularity, informality, or omission, or want of any matter of form

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or substance in any proceeding that does not prejudice the property rights of the person whose property is taxed."

The decree is affirmed, with costs.

The other Justices concurred.

PEOPLE *v.* KARSTE.

1. CRIMINAL LAW—INFORMATION—EXAMINATION.
   An information need not be wholly based upon the complaint or warrant, but it may charge the offense disclosed at the preliminary examination.

2. SAME—MISAPPROPRIATION OF MONEY BY AGENT.
   A broker who, having received a check and written instructions to buy stock, did not buy, but deposited the check in a bank to his account, and spent the money, was rightly convicted under 3 Comp. Laws, § 11572.

3. SAME—AGENTS—BROKERS.
   The word "agents," used in said statute, includes "brokers."

4. DEBTOR AND CREDITOR—PRINCIPAL AND AGENT—QUESTION FOR JURY.
   Where a broker received a check in a letter, with instructions to use it in the purchase of certain stock, and replied that it had been placed to the credit of the principal, who subsequently canceled the order and directed the purchase of other stock, the question as to whether the relation of debtor and creditor existed between them was one of fact for the jury.

5. MISAPPROPRIATION OF FUNDS—EVIDENCE—FINDING OF JURY.
   On October 13th, respondent received by mail a check for $350, with instructions to buy certain stock. He deposited the check in a bank to his credit, and on November 14th received instructions to cancel the first order and buy other stock. At times between October 13th and November 14th his bank account amounted to less than $350. *Held*, that as the bank account on November 16th was $932.16, and on that date the respondent wrote that he had entered the order to buy the other stock mentioned, the jury were justified in finding that he had the funds in his hands on November 14th.

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Exceptions before judgment from Gogebic; Steere, J., presiding. Submitted November 20, 1902. (Docket No. 217.) Decided March 23, 1903.

Otto E. Karste was convicted of misappropriating money placed in his hands for investment. Affirmed.

Charles E. Miller, for appellant.

Horace M. Oren, Attorney General, and *Samuel S. Cooper*, Prosecuting Attorney (*Allan F. Rees*, of counsel), for the people.

MONTGOMERY, J. The respondent was convicted under an information based on section 11572 of the Compiled Laws. On the trial the evidence showed the following facts: Cecil S. Wray, in October and November, 1900, resided at Iron Belt, Wis., about nine miles from the city of Ironwood, and on the 13th of October he wrote a letter to the respondent as follows:

"Mr. O. E. KARSTE,
"Ironwood, Mich.

"*Dear Sir:* I inclose you my mother's check for $350, and desire you to please buy for her four shares National Biscuit preferred stock at 87 or better. When the stock is bought, kindly have certificate made to my mother, Mrs. Eliza Wray, and oblige,

"Yours very truly."

Inclosed in such letter was a check upon the Savings & Trust Company, Cleveland, Ohio, payable to O. E. Karste or bearer, for $350, on deposit, and the number 9,187, which check was signed "Mrs. Eliza Wray." The testimony showed that this money was Mrs. Eliza Wray's money, and that Cecil S. Wray received from Karste a reply to his letter of October 13th, which is as follows:

"IRONWOOD, MICH., October 16, 1900.
"C. S. WRAY, Esq.,
"Iron Belt, Wis.

"*Dear Sir:* I have your favor of the 13th inst., inclosing check for $350, which amount I have placed to your

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credit. I have entered an open order to buy four shares of National Biscuit preferred at 87, and issue certificate to Mrs. Eliza Wray, of Iron Belt, Wis. Thanks.

"Yours truly."

Aside from these letters, there was no communication between Cecil S. Wray and Karste previous to November 13th; but Wray was in Ironwood once or twice during that time, and asked Karste if he had been able to procure the stock for his mother. Wray merely asked him if he had the stock, and he would say "No," and they would probably converse upon something else for a minute or two. The next communication between the parties was a telegram dated November 13th, and sent from Edinburgh, Ind., which telegram was as follows:

"EDINBURGH, IND., November 13, 1900.

"O. E. KARSTE,

"Ironwood, Mich.:

"Cancel Biscuit order, and buy four shares American Steel & Wire preferred at 85 or better.

"C. S. WRAY."

Wray also wrote Karste on the 14th of November as follows:

"325 EIGHTEENTH ST., LOUISVILLE, KY.,

"November 14, 1900.

"Mr. O. E. KARSTE,

"Ironwood, Mich.

"*Dear Sir:* I wired you tonight as follows: 'Cancel Biscuit order, and buy four shares American Steel & Wire preferred at 85 or better.' When you have purchased stock, please have certificate made to Mrs. Eliza Wray, and mail to me at above address. Also cancel my C. & H. order, and mail check to balance account. It is too high for me.

"Yours truly."

Wray received from Karste, in reply to this telegram and letter, a letter as follows:

"IRONWOOD, MICH., November 16, 1900.

"C. S. WRAY, Esq.,

"Louisville, Ky.

"*Dear Sir:* I am in receipt of your wire of the 13th

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and your letter of the 14th, instructing me to cancel your order to buy four shares of Biscuit preferred and also the Cal. & Hec., and in its place to buy four shares of American Steel & Wire preferred at 85 or better. I have entered an open order at this price. The market opened at 85 yesterday morning, which was the lowest for the day, and you are aware that to buy an odd lot like this it would have to sell at about 84½ before your order could be executed at 85. On execution of the order I will, as directed, issue the certificate to Mrs. Eliza Wray, together with statement and check for balance. You will please write and give me your mother's address, that is, her home, which is always necessary to give when certificates are issued. On receipt of your wire yesterday I wrote you to Edinburgh, Ind., thinking it would reach you there. Do I understand that you want a check for the $100 now, regardless of the execution on the other?

"Yours truly."

In response to this last letter Wray wrote the respondent that he need not send check until final settlement was made, or until after respondent had purchased the American Steel & Wire Company stock. This letter was written November 20th, but before that day respondent had left Ironwood and gone to New York; and the next information that Wray received was a letter from respondent's attorney, stating that he had failed, and proposing a settlement by note.

The case was put to the jury under two counts of the information, each of which counted upon a conversion of the $350 in violation of the instructions given in the telegram of November 13th, and confirmed by the letter of November 14th. A motion was made to quash the information on the ground that the offense embodied in the information was not set out in the complaint and warrant under which respondent was arrested. It has been frequently held by this court that the information need not be wholly based upon the facts stated in the complaint or warrant, but that the prosecutor has a right to describe the offense as it is disclosed by the facts appearing upon the preliminary examination. *Brown* v. *People*, 39 Mich. 37; *People* v. *Pichette*, 111 Mich. 461 (69 N. W. 739).

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It is next urged that the relations of the respondent to the complaining witness were not such as to make him subject to prosecution under the statute in question. So far as we are advised, the statute has never received judicial construction in this State, nor has a similar statute been construed in any other State of the Union. The statute nearest analogous to the statute in question is the English statute (24 & 25 Vict. chap. 96, § 75), which provides that:

"Whosoever, having been intrusted, * * * as a banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security, or any part thereof, respectively, or the proceeds, or any part of the proceeds, of such security, for any purpose or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in any wise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively, * * * shall be guilty of a misdemeanor."

Under this statute, it was held that where a stock-broker, who had received an order to buy stock, together with a check for "cover and commission," did not buy, but paid the check into his bank, and spent the money, he was rightly convicted. *Reg.* v. *Cronmire*, 54 L. T. (N. S.) 580. See, also, *Reg.* v. *Christian*, L. R. 2 C. C. 94. The language of our statute differs, it is true, from the English statute, in that it does not name brokers. But it does employ the word "agents," which is comprehensive enough to include brokers, and we think the purpose is similar to that of the English statute. This is not a statute to punish embezzlement, but to protect persons who place in charge of another funds for control or investment, accompanied by specific instructions, and, we think, is broad enough to cover the relation of principal and broker, unless there should be something in the relations of the

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parties, or in their dealings, which indicates a purpose to create the relation of debtor and creditor. Whether this was the purpose in the present case was, in our view, at most, a question of fact for the jury, and this question was fairly submitted to the jury by the trial judge.

Respondent's counsel earnestly insists that by reason of respondent's letter to Wray, stating that he had placed the $350 to Wray's credit, the inference must be drawn that it was the purpose to create the relation of debtor and creditor. We do not so construe this statement. It would be a very proper proceeding, if the money were to be treated as the money of the prosecutor, for the respondent to have kept some account of it, and to have entered a credit upon his books. It is in the nature of a special deposit or trust, and the fact that a memorandum of it, or a credit for the amount of the deposit, was entered upon the respondent's books, did not change the character of the deposit.

It is next contended that the evidence shows that there could not have been a misappropriation of this money at any time after the 13th of November and before the 3d of December, the date when the demand was made. The argument appears to be this: That as the respondent's bank account shows that this money was deposited in October in his bank account, and that at times between that date and November 13th his bank account amounted to less than $350, it cannot be inferred that this money was on hand at the time of the commission of November 13th and 14th. The answer to this contention may be found in the fact that on the 16th of November respondent replied to the letter and telegram, stating that he had entered an open order at the price stated, and we think the jury would be justified in treating this as an admission that he still had the funds in his hands with which to carry out the instruction. It also appears that on this date he had in the bank, subject to his check, $932.16. If he had drawn this money out at any time, but replaced it, and had it on hand at the time the instructions were received, the violation of his instructions, under the circumstances necessary to constitute the offense, would make him equally guilty.

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The questions discussed dispose of the meritorious contentions in the case. We are constrained to hold that there is no error to the prejudice of the respondent, and, while a different result might have been reached by the jury, we are not able to say that there is not sufficient testimony to support the finding in all respects.

The conviction is affirmed, and the court below directed to proceed to judgment.

The other Justices concurred.

DUNN v. DUNN.

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1. SALE—OFFER—ACCEPTANCE.
   An offer to sell lands at a certain price, and send the deeds to a bank on being informed that the price has been deposited, is not accepted by a letter directing the vendor to send the deeds, unaccompanied by evidence of the deposit required.

2. SAME—WAIVER OF TERMS—NEW OFFER.
   An owner of lands, who had proposed to sell, and send the deeds to a bank on being informed that the price had been deposited, did not waive the deposit by sending deeds to the bank with instructions to deliver on receipt of the price within four or five days, but thereby made a new proposal.

3. SAME—WITHDRAWAL OF OFFER.
   An offer to sell lands if the price is paid within five days cannot be accepted by tendering the price after the five days, and after notice of the withdrawal of the offer.

Appeal from Alpena; Emerick, J. Submitted December 2, 1902. (Docket No. 41.) Decided March 23, 1903.

Bill by Lyman H. Dunn and Thomas T. Allen against Robert W. Dunn and George McNichol for the specific performance of a land contract. From a decree dismissing the bill, complainants appeal. Affirmed.

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Main J. Connine (*William H. Simpson*, of counsel), for complainants.

Henry K. Gustin (*Charles R. Henry*, of counsel), for defendants.

HOOKER, C. J. Robert W. Dunn, a resident of Chicago, was owner of the original title to a large tract of land in Michigan, which he had purchased from grantors who reserved certain kinds of timber thereon. The complainant Allen claims to have contracted for the purchase of upwards of 22,000 acres of this land for an agreed price of $407, the deed to be made to complainant Lyman H. Dunn, and the complainants filed the bill in this cause to compel a specific performance of said contract. The learned circuit judge dismissed the bill upon two grounds: (1) That the negotiations amounted to no more than an offer, and that the same was withdrawn before acceptance; (2) that the contract, if made, was unconscionable, and should not be enforced.

The important legal question relates to the alleged contract. The negotiations were by letter, and, without discussing the correspondence in detail, it may be said that no agreement was reached prior to August 17, 1899, when Robert W. Dunn wrote to Allen that out of the 564 forties only 157 had been homesteaded, and that he would accept $1 per forty for those not homesteaded, and that, if Allen would agree to this, he (Dunn) would send deeds to the bank, on being informed by the bank that Allen had deposited $407 for him. A few days later Allen wrote Dunn as follows:

"Your favor of 19th at hand. You can send the deeds. Make them out to Lyman H. Dunn, * * * and send to the bank."

On August 25, 1899, Dunn wrote:

"Messrs. T. T. ALLEN & Co.,
"Au Sable, Mich.

"*Gentlemen:* Your favor of Aug. 20th at hand. As

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you have already a list of the lands included in deed, this day sent to the bank, it, of course will not be necessary for you to take any considerable time before remitting. I inclose herewith copy of instructions to bank. I am holding off a deal in this land here in Chicago because of my agreement with you, but shall not consider myself bound longer than the time stated in the inclosed instructions. Please remit promptly.

"Yours truly,
"ROBT. W. DUNN."

Inclosed in this letter was a copy of a letter sent the bank, as follows:

"AUGUST 23, 1899.

"GOWANLOCK & DODDS, Bankers,
"Oscoda, Mich.

"*Gentlemen:* Herewith we inclose deed of the several tracts of land in Alcona Co., which please deliver to T. T. Allen upon remittance to me four hundred and seven dollars ($407). I do not care to have you hold this longer than four to five days, and, if not taken up before that time, kindly return to me.

"Thanking you for your favor, I am,
"Yours truly."

The deed referred to in this letter was sent to the bank, and on August 26th it was handed to Allen, to look over and compare the descriptions with a list that he had, with a request to attend to them, and send the money, as they were in a hurry. On Tuesday, the 29th of August, the cashier requested Allen to bring over the deed, because there was a mistake in it, and Allen did so, and delivered it to him. He afterwards refused to deliver it to Allen, saying that he had been instructed not to do so, which was true.

Did the request to send on the deed constitute an acceptance of an offer? We think not. It did not comply with the terms of the offer, because it was not accompanied by the evidence of the deposit required. It is true that the deed was sent in compliance with the request, but it is not clear that this was intended as a waiver of the deposit. The bank was authorized to deliver on pay-

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ment, and within a limited time, not mentioned in the correspondence. This was a new offer, and it was communicated to Allen through a copy of the instructions. It cannot be said that Allen bound himself to accept this deed or take the land. He received the deed for comparison, and acceptance or rejection. Subsequently the deed was returned at the banker's request, and the court has found that this occurred, and that Allen was informed that it was ordered to be returned, before it was accepted. He did not accept the offer until he tendered his check. According to the testimony of the cashier, he received back the deed on August 29th, and the check was dated August 31st. The cashier was instructed, in the first place, not to hold the offer open more than four or five days; and, if his testimony is true, Allen was informed of his instructions not to deliver the deed before the 31st. The alleged tender was not made until after the expiration of four days, and the direction to the bank was not to hold longer than four or five days, as Allen knew. There is a conflict in the testimony regarding the time the tender was made, but we agree with the conclusion reached by the circuit judge.

The decree is affirmed, with costs of this court.

The other Justices concurred.

BROWN *v.* KENNEDY.

1. DRAINS—CHANGES IN APPLICATION—EVIDENCE.
   Evidence, in a suit by a drain commissioner to recover the costs of a drain proceeding that had been dismissed, considered, and *held* insufficient to justify the jury in finding that interlineations in the application were made after it had been received by the commissioner.

2. SAME—ACTION FOR COSTS.
   Where changes were made in the description of a drain after

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the application had been signed by the petitioners and before it was received by the commissioner, the fact that the commissioner acted upon it in good faith did not give him a right to recover his costs against the petitioners, under 2 Comp. Laws, § 4319.

3. SAME—EVIDENCE.
It is within the discretion of the trial judge to require a drain commissioner to explain alterations in a drain application before admitting it in evidence, in an action by him to recover his costs against the petitioners.

4. SAME—PRESUMPTIONS.
Any possible presumption that the alterations in a drain petition were made before the paper was signed was in this case eliminated by the testimony of the applicants that they signed before the changes were made, and the testimony of the surveyor that he made the alterations before any one signed the paper.

5. SAME—BILL OF COSTS.
The bill of costs in a drain proceeding that has been dismissed is admissible in a suit by the commissioner to recover the costs.

6. SAME—ESTOPPEL.
In an action by a drain commissioner to recover his costs against the petitioners, where it is claimed that alterations were made in the petition after it was signed, evidence is admissible to show that the defendants concealed or failed to assert the alterations, as such evidence tends to show an estoppel.

7. SAME—OPINIONS.
The opinion of a surveyor that a drain application was a regular and fair appearing paper is inadmissible.

Error to Saginaw; Snow, J. Submitted December 2, 1902. (Docket No. 128.) Decided March 23, 1903.

Assumpsit by Alonzo M. Brown, drain commissioner of Saginaw county, against Martin Kennedy and others, to recover the costs and expenses incurred under an application for a drain. From a judgment for defendants, plaintiff brings error. Reversed.

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F. E. Emerick (*James H. Davitt*, of counsel), for appellant.

Crane & Crane, for appellees.

HOOKER, C. J. The plaintiff, a drain commissioner of Saginaw county, laid out, and let contracts for the construction of, a drain. A bill was thereupon filed to restrain further action, and this resulted in a decree granting a perpetual injunction as prayed in the bill, upon the ground that a sufficient outlet was not provided. No appeal was taken, and the commissioner finally dismissed the proceedings, and began this action to recover the costs and expenses incurred from the applicants for the drain, in accordance with the provisions of 2 Comp. Laws, § 4319, which are as follows:

"Such applicants shall be jointly and severally liable for all costs and expenses in case the county drain commissioner, upon examination, or upon examination and survey, shall determine that the same is unnecessary or impracticable, or in case the proceedings shall be dismissed for other cause. If the persons signing such application shall refuse to pay such costs and expenses, the county drain commissioner shall bring suit in a court of competent jurisdiction, and collect such costs and expenses, with costs of suits."

The defendants filed a plea of the general issue, and a denial upon oath that they signed the application upon which the drain proceedings were based. Upon the trial the signatures were proven to be genuine by several of the defendants, but they also stated that the description of the drain applied for had been altered in a material respect after such signatures were written, and without their knowledge or assent. The testimony shows that one Martin Kennedy brought the application to each of the signers, who signed it at his request. It was afterwards delivered to the plaintiff, but he was unable to state whether he received it by mail or otherwise. He was quite positive that no alteration was afterwards made, although he admitted that the surveyor may have had an

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opportunity to make the alteration when he surveyed the route, which was after the application was filed. The learned circuit judge instructed the jury that they must find for the plaintiff, unless they should find that the alteration was made after he received the application, in which case he could not recover. They returned a verdict for the defendants, and plaintiff has appealed.

The first point discussed by the plaintiff is the proposition that he received the application as a public officer, and acted upon it in good faith, and that he is entitled to recover his expenses and costs, although the application was changed before he received it. The verdict, when considered in the light of the charge, shows that the jury must have found that the application was not changed before it was presented to him, but afterwards; and therefore this question is eliminated, unless we should say that there is no evidence that justifies such a finding. The evidence upon the subject consists of the testimony of the defendants, who testified that they signed before the alterations were made, but none of them were able to say that they were not made before the paper was presented to the plaintiff. The plaintiff testified that he did not change it, or know who did, and that, while Scholtz, the surveyor, might have taken the paper, for aught that he knew, he had no knowledge of his doing so; and Scholtz testified that he took a copy of it on the occasion of his survey. Scholtz also testified that he made the alterations himself, at the request of one Dr. Hillyer, before any of the signatures were appended to the paper. Neither Hillyer nor Martin Kennedy was called, though it is claimed that they were within reach. The plaintiff testified that he filed the application May 3d, and acted upon it May 15th, and that the interlineations were in the paper then, and that he copied them. We find no tangible testimony that the interlineations were made after the paper was filed. All of the testimony was as consistent with the theory that it occurred before as after the filing, and the jury should not have been allowed to find that the altera-

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tion was made after the paper was received by the plaintiff.

The evidence is clear that some erasures and alterations were made, and it was a question of fact whether they were made before or after defendants signed the paper. If before, they were liable for the costs and expenses. If, however, they were made afterwards, it is not so certain that they were liable. On this record it appears that Martin Kennedy was the man who circulated the petition, and these defendants signed at his request. There is nothing to indicate that they did more. We do not discover that he was clothed with any authority to alter the same, or present any petition other than that signed by them, or that he was in any sense their agent, further than to present the petition as signed; and we are convinced that the fact that plaintiff acted in good faith does not give a right of action against defendants, who signed no such application as that acted upon. On the other hand, there may be circumstances which show an acquiescence in an alteration made after the application was signed, and which would justify the jury in finding an estoppel against the defendants, justifying a verdict against them.

Several questions of minor importance are raised. The first relates to the requirement of the judge that plaintiff explain the erasures and interlineations in the writing before allowing it to be received in evidence. Evidently he considered the paper suspicious upon its face. It was within his discretion to require this proof in such case. *Munroe* v. *Eastman*, 31 Mich. 285; *Sirrine* v. *Briggs*, Id. 445. It is urged that the legal presumption that the alteration was made before the paper was signed was ignored. In view of the testimony, we are of the opinion that any possible presumption was practically eliminated, and that plaintiff was not injured by the course taken.

We think the bill of costs may have been admissible as part of the drain proceedings, and understand that it was admitted.

It was also competent to show that defendants concealed

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or failed to assert the alteration, if circumstances arose making it their duty to do so. Such evidence would have tended to show an estoppel.

It was not competent to take Mr. Scholtz's opinion as to whether this paper was a regular and fair appearing paper.

The judgment must be reversed, and a new trial ordered.

The other Justices concurred.

WILSON v. MUSKEGON, GRAND RAPIDS & INDIANA RAILROAD CO.[1]

1. TITLE TO LANDS—ESTOPPEL.
   Interests in land cannot rest on estoppel alone.

2. RAILROADS—LAND CONTRACTS—POSSESSION.
   A land contract by the terms of which the vendor agreed to convey a strip of land to a railroad company for a right of way when it should have definitely settled upon and located its line and determined upon the construction of the road, but giving no right of possession, even when construed in the light of the statute (2 Comp. Laws, § 6234), does not give the railroad company a right of possession that will constitute a defense to an action of ejectment, though the road has been constructed and possession maintained for a time. GRANT, J., dissenting.

Error to Muskegon; Russell, J. Submitted December 5, 1902. (Docket No. 154.) Decided March 23, 1903.

Ejectment by Lucie S. Wilson against the Muskegon, Grand Rapids & Indiana Railroad Company and the Grand Rapids & Indiana Railway Company. From a judgment for plaintiff, defendants bring error. Affirmed.

T. J. O'Brien and *James H. Campbell*, for appellants.

William Carpenter, for appellee.

[1] Rehearing denied May 29, 1903.

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HOOKER, C. J. There are two questions raised by the briefs of counsel: (1) Whether the plaintiff proved a *prima facie* title to the premises in dispute; and (2) whether the statute under which the defendant's railroad was located justifies us in holding that it acquired a legal estate or right of possession under an executory contract for the sale of land.

Each party claims title from Dennis Smith, plaintiff by deed, and defendant under a writing which reads as follows:

"In consideration of the sum of one dollar to me in hand paid, and of other valuable considerations to me moving, I hereby agree to convey, free of any incumbrance, to the Muskegon, Grand Rapids & Indiana Railroad Company, its successors and assigns, a strip of land thirty (30) feet in width over and across the following described premises, to wit: The northeast quarter of the northeast quarter of section thirty-one (31) in the township of Muskegon, county of Muskegon, State of Michigan. The said railroad being one to be constructed from a point on or near the lake shore in the city of Muskegon, Muskegon county, Michigan, to the city of Grand Rapids, in the same State. And I further promise and agree to make such conveyance on request of said railroad company at any time when it shall have definitely settled upon and located its line between the points above named, and determined upon the construction of the road: *Provided*, however, that such time shall be within one year from the date hereof. This agreement for right of way shall not inure or be assigned or transferred to any other railroad company now entering the city of Muskegon with its railroad.

"In witness whereof, I have hereunto set my hand and seal this 25th day of February, 1886.

"DENNIS SMITH.

"In presence of
"N. L. KEATING,
"LIZZIE J. CAVANAUGH.

"STATE OF MICHIGAN, } ss.
County of Muskegon. }

"On this 25th day of February, 1886, before me, a notary public in and for said county, personally came

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Dennis Smith, who acknowledged that he executed the above instrument as his free act and deed.

"L. N. KEATING,
"Notary Public,
"Muskegon Co., Mich."

Were this a contract between natural persons, it would be held to convey nothing. It would give an equitable interest, and it might be held to give (by implication) a license to survey and determine a line for the projected railroad. It would not be said to transmit a right of title or possession that would avail as a defense in an action of ejectment. Presumably this railroad company with which the contract was made was organized under the general law, and had all of the rights which the statute gives to any railroad. It was authorized to acquire a right of way, and to take voluntary grants and donations of real estate and other property. It is urged that this contract, made for the purposes of railroads, when construed in the light of the statute (2 Comp. Laws, § 6234), gives a right of possession in the railroad company making it, especially where the road has been constructed and possession maintained for a time by such company. We may eliminate the latter portion of the proposition, because if the contract did not, of itself, when considered in the light of the statute, confer this right, there would be nothing left for it to rest upon but an estoppel *in pais*, and it has been repeatedly held that interests in land cannot rest on estoppel alone. The statute of frauds forbids.

I am not satisfied that the legislature contemplated any such construction. It is true that railroad corporations acquired the right to take and hold property by virtue of the statute, but there is nothing to indicate that they were to acquire it in any other way than any other citizen could do, except it should become necessary to condemn it by virtue of the power of eminent domain. It was apparently not necessary to do this in the present case. The railroad company was able to acquire the land by contract of purchase, and did so. What was the contract? Nothing but a plain everyday land contract, which gave it a right to a

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deed when it performed the contract on its part. No right of possession was given by the terms of the writing. It is only by inference that we can say that it gave a right to enter for the purpose of survey. It could acquire title to land by grant or lease, or it could acquire it by judicial procedure.

What remedies the defendant has in equity is not a question for our consideration. If there is a valid executory contract, presumably it can be specifically enforced. If there is none, and none can be secured, it may be that it will be necessary to resort to condemnation proceedings, as in the case of *Minneapolis, etc., R. Co.* v. *Marble*, 112 Mich. 12 (70 N. W. 319), where it was said:

"It may be a matter of hardship to the railroad company, after all these years of occupancy, and after expending large sums of money in improvements, to be compelled to take condemnation proceedings; but we are unable to agree with its counsel that it acquired title by this parol arrangement, or that it can hold land by dedication."

It occurs to the writer to say that it would take but a slight extension of the construction of this statute asked for in this case to make it applicable to the state of facts in that case, for it is as easy to say that this statute abrogates the rule that contracts for the sale of land must be in writing, as that a right of possession goes with a written contract that does not mention it, and, under existing rules, does not include it. *Harrett* v. *Kinney*, 44 Mich. 457 (7 N. W. 63); *Moran* v. *Moran*, 106 Mich. 13 (63 N. W. 989, 58 Am. St. Rep. 462). If adopted, such construction must be a matter of first impression, for no analogous case is cited. The case of *Greenwood* v. *School District*, 126 Mich. 81 (85 N. W. 241), was an injunction bill to restrain the erection of a schoolhouse, and it was dismissed because the district had been in possession under a contract which, though oral, was so far performed that it was inequitable to permit the complainant to repudiate it. It is not, in my opinion, an authority upon which the defendant's contention in this case can be safely sustained.

I think the judgment should be affirmed.

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MOORE, CARPENTER, and MONTGOMERY, JJ., concurred with HOOKER, C. J.

GRANT, J. (*dissenting*). This is an action of ejectment. Both parties claim title from the same grantor, one Dennis Smith. Plaintiff claims by regular chain of title by deed from Mr. Smith. The defendant claims a right of way 30 feet wide across the land by written contract with Smith. The case was tried by the court without a jury, and written findings filed, and judgment entered for the plaintiff. The contract under which defendant claims its right of way was executed February 25, 1886, and reads as follows:

"In consideration of the sum of one dollar to me in hand paid, and of other valuable considerations to me moving, I hereby agree to convey, free of any incumbrance, to the Muskegon, Grand Rapids & Indiana Railroad Company, its successors and assigns, a strip of land thirty (30) feet in width over and across the following described premises, to wit: The northeast quarter of the northeast quarter of section thirty-one (31) in the township of Muskegon, county of Muskegon, State of Michigan. The said railroad being one to be constructed from a point on or near the lake shore in the city of Muskegon, Muskegon county, Michigan, to the city of Grand Rapids, in the same State. And I further promise and agree to make such conveyance on request of said railroad company at any time when it shall have definitely settled upon and located its line between the points above named, and determined upon the construction of the road: *Provided*, however, that such time shall be within one year from the date hereof. This agreement for right of way shall not inure or be assigned or transferred to any other railroad company now entering the city of Muskegon with its railroad."

This contract was recorded June 18, 1886. The railroad company therein named made a map of its line and route through the county of Muskegon, and located, according to said map, the line as running across the southerly part of said land. This map was, on July 13, 1886, filed in the office of the register of deeds. Before December 31, 1886, the company had entered upon the said land, and con-

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structed its roadbed and railroad from the city of Grand Rapids to the city of Muskegon, upon and across said land, at the same time building fences on each side of its track. It commenced running trains regularly from Grand Rapids to Muskegon early in the month of December, 1886. Said railroad has been maintained and operated continuously from that time to the present by the company named in said contract and its lessee, the defendant the Grand Rapids & Indiana Railway Company, and they have been in the exclusive and continuous possession thereof since. There has been no change in its roadbed during all this time. Smith was a resident of Muskegon, and resided there until his death, in 1892, and his heirs have since resided there.

Plaintiff concedes that, under the agreement, the defendants are entitled to a right of way across the land. Her counsel says it is a question only of location. She claims that another location was agreed upon alongside the present one. In fact, her counsel asserts that four feet of the present right of way is a part of the right of way as plaintiff claims it was established by agreement between Mr. Smith and the officers of the company. The record contains no evidence to sustain plaintiff's claim of any such location, except the map filed July 13th. Her counsel says:

"It [the Muskegon, Grand Rapids & Indiana Railroad Company] has a right of way immediately adjoining the premises in dispute, and occupied in part by it, to which it is lawfully entitled, and which came to it through the plaintiff's grantor."

And, again:

"The map itself was offered in evidence, but no other testimony was given tending to show the exact location of the proposed line of the railroad. It can be determined from that map only by applying the rule on the scale on which the map is drawn. That scale is so small that it is impossible to come to a correct conclusion by the use of the rule."

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Her counsel further claims that the defendants have only an equitable title, which is no defense to an action of ejectment, and can be enforced only in a court of equity.

Counsel for the defendants contend that the present right of way was located under the agreement; that it was acquiesced in by Mr. Smith and his heirs for over 14 years, and that the defendant Grand Rapids & Indiana Railway Company has the legal possession thereof.

The location of the right of way under the contract was a floating one, to become fixed only when the conditions of the agreement were complied with. By its terms the defendant the Muskegon, Grand Rapids & Indiana Railroad Company was given the right to enter upon the land to make surveys and to select the right of way. It entered, selected it, and inclosed it by fences. All these things were done with the acquiescence of Mr. Smith, and the use and occupancy by the railroad company acquiesced in by him and his heirs since, till the commencement of this suit. If it be conceded that the right of way now in use is not on the exact line indicated upon the map, this is not a case where the exact line of the map must control. The parties located the line elsewhere, and its location and use were and have been since acquiesced in. This case is not within *Wood* v. *Railroad Company*, 90 Mich. 334 (51 N. W. 263), where the plaintiff contracted to convey to the railroad company a right of way through his lands "on the route lately surveyed by said company." The land in that case had been surveyed and staked out. It was held to be an important fact that the words in the contract, referring to a future survey, were stricken out. When the company selected an entirely different route, the plaintiff immediately protested, and moved seasonably to enforce his rights. In the present case there was no dispute, and the right of way was laid out substantially along the line indicated upon the map. The company was acting under the agreement in locating and constructing its roadbed, and Mr. Smith knew it. There is no evidence that he was injured, or that the company was not acting

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in good faith. The location of the right of way, under such circumstances, was a full compliance with the agreement.

The court was in error in holding that the defendant Muskegon, Grand Rapids & Indiana Railroad Company is not entitled to the possession of its right of way. A railroad corporation can obtain its right of way only in the two methods provided by the statute: (1) By agreement with the land owners; and, (2) that failing, by condemnation proceedings. It cannot commence the latter without exhausting the former. Only when terms cannot be made with the owner can it proceed to condemn. When it has obtained the right of way by agreement, it is, in the absence of provisions to the contrary, entitled to the right of possession as effectually as though it obtained that right by condemnation proceedings. When condemned, the right of possession becomes absolute upon payment of the sum awarded for such right of way. The only prerequisite to its title and to possession is to pay the compensation awarded. When this is done the land is acquired, and, under the statute, for public use. When the right of way is obtained by agreement with the owner, and the agreement is silent as to possession, the company is entitled to possession upon fulfilling the terms of the agreement. No deed was necessary to establish the legal rights of the company. The agreement, compliance therewith, the location and construction of its roadbed, and its use by the company as required by law, establish the legal right of possession in the company. Its possession is no other or different in character than it would have been if Mr. Smith had made the deed as agreed upon. So long as the railroad company carries on its business as required by law, so long it is entitled to possession, with or without a deed.

"Where the statute * * * gives the right to agree upon compensation, then the matter of damages may be settled by oral agreement, and the title will vest by virtue of the statute, the same as if the damages were ascertained

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and deposited pursuant thereto. Or the owner may waive prepayment simply, and thereupon the title will vest, subject to the lien for just compensation to be afterwards adjusted and paid." 2 Lewis, Em. Dom. § 298.

"A release of damages has the same effect as the assessment and payment of damages under the statute." Id. § 294.

I think that the case of *Greenwood* v. *School District*, 126 Mich. 81 (85 N. W. 241), is conclusive of this case. There a parol agreement to give an acre of land for a schoolhouse site, not definitely located by the agreement, was held valid, after the school district authorities had selected the land, fenced it, built a schoolhouse, and occupied it for many years. What there rested in parol is here established by a written agreement. The selection, inclosing, and use of the land fully establish the defendant's right to possession, and, as long as it uses the land for the purposes of a right of way, that possession is legal. See, also, *Smith* v. *Hamilton*, 20 Mich. 433, 439 (4 Am. Rep. 398).

Judgment should be reversed, and judgment entered in this court for defendants for a strip of land 30 feet wide, the center line of which is the center line of the railroad track of the Muskegon, Grand Rapids & Indiana Railroad, as the same is constructed upon and across the lands described in the declaration. Defendants should recover the costs of both courts.

OWEN v. MORELAND.

PLATS—DEDICATION OF STREETS—AUTHORITY OF COMMISSIONER OF PUBLIC WORKS.

The commissioner of public works of Detroit cannot compel the owner of land, desiring to plat it, to dedicate and include in the plat the land that, according to the general plan of the city, would be within the limits of its streets when extended.

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Certiorari to Wayne; Donovan, J. Submitted January 6, 1903. (Calendar No. 19,710.) Decided March 23, 1903.

Mandamus by La Fayette Owen and others to compel De Witt H. Moreland, commissioner of public works of the city of Detroit, to approve a plat of certain lands. From an order denying the writ, relators bring *certiorari*. Reversed.

Walker & Spalding, for relators.

P. J. M. Hally and *A. B. Hall* (*Timothy E. Tarsney*, of counsel), for respondent.

PER CURIAM. Relators, owning property on both sides of Kercheval avenue in the city of Detroit, between Van Dyke and Maxwell avenues, asked respondent to approve their plat of the same. According to the plan of the city, Parker avenue, when opened, will pass through relators' subdivision, and a strip of land owned by relators, lying immediately east of the proposed plat, is within the limits of another unopened street. Relators did not dedicate to the public, nor did they plat, the land lying within the limits of these proposed streets. Said land is marked on their plat, "Not included in plat." Respondent refused to approve relators' plat, because they did not dedicate the above-described land to the public. Relators applied to the circuit court for the county of Wayne for a *mandamus* to compel respondent to approve their plat. Their application was denied, and the matter is before us for review.

The law governing this matter is contained in the charter of the city of Detroit, and may be found in the opinion in *Van Husan* v. *Heames*, 91 Mich. 519 (52 N. W. 18). In that case it was held that a landowner might plat from the line of one street to the line of another, without dedicating to the public the property owned by him within the lines of the streets. In the case of *Serviss* v. *Board of Public Works*, 115 Mich. 63 (72 N. W. 1117),

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this court held that a landowner could not plat the property within the limits of a proposed street. The relators contend that their case is governed by *Van Husan* v. *Heames*. Respondent contends that it is governed by *Serviss* v. *Board of Public Works*. We think it is clearly governed by the former case, which holds that a landowner may plat to the limit of a proposed street without being compelled to dedicate the land within those limits. It is a mistake to suppose that the commissioner of public works is under an obligation so to use his power of approval as to compel owners to dedicate, for the purpose of a proposed street, land which they do not plat. It is not surprising that the legislature has indicated no intent to impose such an obligation, while the value of the property dedicated is not taken into consideration when the dedicating owner is assessed for opening the proposed street through the land of his neighbor.

The order of the court below will be reversed, and a *mandamus* granted.

BALE *v.* MICHIGAN TONTINE INVESTMENT CO.

CORPORATIONS—FRAUDULENT CONTRACT—EQUITY JURISDICTION.

This case is substantially like *Edwards* v. *Michigan Tontine Investment Co.*, *ante*, 1. The fact that complainant, after ascertaining the fraudulent conduct of defendants, refused to continue payments upon his contract, does not justify a different result.

Appeal from Ionia; Stone (George P.), J., presiding. Submitted January 6, 1903. (Docket No. 1.) Decided March 23, 1903.

Bill by John J. Bale against the Michigan Tontine Investment Company and others for an accounting and

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the appointment of a receiver. From an order overruling a demurrer to the bill, defendants appeal. Affirmed.

N. O. Griswold and *C. L. & C. B. Barden*, for complainant.

A. A. Ellis, *R. A. Hawley*, and *Morse & Locke*, for defendants.

MONTGOMERY, J. This case is before us on demurrer to the bill of complaint. In only one respect does it differ in any substantial way from the case of *Edwards* v. *Michigan Tontine Investment Co.*, *ante*, 1 (92 N. W. 491), in which case we held that the bill stated a case for equity jurisdiction. The particular in which the present case differs from that is that the present bill avers that the complainant, after ascertaining the fraudulent conduct of the defendants, and that their contract was *ultra vires*, refused to continue payments upon his contract. This averment does not justify a different result. If the charges in the bill are maintained, the complainant ought to be placed *in statu quo*.

The order overruling the demurrer will be affirmed, with costs, and the case remanded for further proceedings.

The other Justices concurred.

CONSTANTINE *v.* KALAMAZOO BEET SUGAR CO.

1. CORPORATIONS — OFFICERS — AUTHORITY — INDEMNITY — SUGAR BEETS.

Where lessees of land have agreed to raise and deliver to a beet sugar factory a crop of sugar beets, and, after partially raising the crop, it becomes doubtful whether the venture will prove a success, the secretary and manager of the factory has authority to make a contract with the lessor, who is also a

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mortgagee of the crop, that, if he will furnish the money to complete the raising of the beets, the company will guarantee the parties against loss.

2. CONTRACTS—ESTOPPEL.

The lessees of land agreed with a beet sugar company to raise and deliver to the company 40 acres of beets at an agreed price. The season becoming unfavorable, the mortgagee of the crop refused to furnish money to complete the raising of the beets unless the company would give the parties the same indemnity it had given R.; and, upon being assured of such indemnity, he made further expenditures. *Held*, that the company could not deny that a contract was made.

GRANT, J., dissenting.

Error to Kalamazoo; Adams, J. Submitted January 9, 1903. (Docket No. 18.) Decided March 23, 1903.

Assumpsit by Sidney M. Constantine against the Kalamazoo Beet Sugar Company upon a contract of indemnity. From a judgment for plaintiff, defendant brings error. Affirmed.

N. H. Stewart and *Sheridan F. Masters*, for appellant.

Howard & Howard, for appellee.

The defendant owns and operates a beet sugar factory. May 1, 1899, two parties (Keys and Constantine) made a contract with the defendant by which they agreed to grow 40 acres of sugar beets, and sell the proceeds thereof at given prices to the defendant. The part of the contract material to this case reads as follows:

"When this contract shall be signed, and a copy thereof be delivered to each party, no agent of said second party has any authority to change or alter the terms and conditions thereof."

October 26, 1899, this contract was assigned to plaintiff in the following written instrument:

"For value received we hereby sell, assign, transfer, and set over to S. M. Constantine (mortgagee of crop) all

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our right, title, and interest in and to the within contract, together with all subsequent agreements made with the company in reference to the subject-matter contained therein."

Plaintiff owned the land on which Keys and Constantine agreed to raise the beets. He leased the land to them, and agreed to advance them money required for the purpose of putting in and cultivating the crop, and in the lease it was agreed that it "shall be a lien on said crops for the rent and any money or labor advanced, with interest on all except rent at seven per cent. per annum." The rental of the lease was $260, to be paid as the beets were delivered and paid for. August 17, 1899, plaintiff, in order to further secure him for rent and moneys advanced to Keys and Constantine, took a chattel mortgage from them for $675 upon the sugar beet crop.

The season was an unfavorable one, and when it became quite evident that there would be a loss to Keys and Constantine, and also to plaintiff, he, in July, interviewed Mr. Henry, the agent for the defendant, claiming that he represented both Keys and Constantine and himself, and that he made a parol agreement changing the contract, by which the defendant, through Mr. Henry, its agent, guaranteed plaintiff, as well as Keys and Constantine, from all loss. The language relied upon by the plaintiff to establish this contract reads as follows:

"*Q.* Mr. Constantine, at any time after this contract was made, did you hear any rumor in regard to some parties having a different contract from what Keys and Constantine had with the beet sugar company?

"*A.* I did. I went to Kalamazoo, and saw Mr. Henry, the secretary of the company, in the company's office in the city of Kalamazoo. The conversation I had that first time with Mr. Henry was along in July, about the time the drought was visiting our beets down in that part of the country; and, after hearing this rumor about a guaranty of contract with other growers, I went down there to see Mr. Henry at Kalamazoo. I had met Mr. Henry before, and, after talking with him about the condition of the beets and the drought, I stated to him that I under-

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stood it was rumored that parties in Three Rivers had a guaranty against all loss on raising beets; that is, that they had a different contract from what we had; that I understood the contracts were all the same. He replied that they were all the same, and he says: 'Mr. Constantine, that is a mistake. Nobody has any different guaranty from you or Mr. Keys and Mr. Constantine. We are not doing business that way.' And he turned around to the desk to pull out to show me the other contracts with the other parties (I think I mentioned Dr. Sidmore and Mr. Reitz), and he said, 'We are not doing business that way, and I can show you;' and he turned around to his desk (we were sitting alone in his office on South Burdick street), and he says, 'I will show you, sir, nobody else has any different contract from yourself.' I said: 'Mr. Henry, your word is good. You don't have to show me. If you say so, it is all right. I want to understand that we are on the same footing as anybody else. You know I am furnishing money— I so informed you before. I am furnishing money, and have been, to put in these beets, and the prospects are not favorable, and I want to know we stand on the same footing as everybody else in regard to the raising beets;' and he says, 'You do.' I then returned to Three Rivers. I told him that I was furnishing money in the early part of July; that I had a lien on the crop. I met him here, introduced myself to him, and I told him for whom I was acting when I went to see him there in July,—for Louis Constantine and Ezra N. Keys and myself, as mortgagee. He simply said at that time that I had the same contract, —assured me,—and I returned home.

"After that I had a further talk with Mr. Henry, the secretary of the company. I came back to Kalamazoo; met Mr. Henry. I spoke about the crop; the prospects were poor; worms appearing in the crop about that time; and that I understood Mr. Reitz had a guaranty against loss, and he had assured me different; that we stood just the same as anybody else; and he was surprised that I would doubt his word. He went on to state that we could take a great many contracts anywhere if we could guarantee the loss, but we don't; we weren't doing business in that way; we were doing business on business principles. I said I supposed so, but I wanted it understood then and there that I was to stand just as well as William Reitz, or anybody else, in regard to any loss; that I had put up the money, the boys had worked hard, and we were going

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to stop right there. Mr. Henry then said to me: 'You do stand just as well; Mr. Reitz or no one else has got any guaranty.' I then said: 'All right, Mr. Henry. With that understanding—that we are to stand just as well as Mr. William Reitz, or anybody else, against all loss—I will go on and harvest this crop; have the boys do it, and deliver it to market.' He said: 'Yes, sir; it is all right. You shall have the same protection that Mr. Reitz or anybody else.' With that agreement, I went out and went home.

"At that time I told him I appeared for Ezra N. Keys and Louis F. Constantine and myself. He knew what my connection was with it. In that conversation I told him we were going to stop right there; that the crop looked bad; that we would have to go to additional expense if the worms attacked us as they had other fields; I didn't propose to put any more money into it; I was going to stop right there. I did put more money into it after that talk. I talked to him about the treatment in case the worms should come and bother us very much, and went back home, and he wanted the boys to go ahead and buy implements and paris green, and work the crop the best we could to save it.

"*Q.* You may state whether or not you would have gone on and furnished any more money on that crop, except under this arrangement, unless Mr. Henry had made this arrangement with you.

"*A.* I would not; no, sir.

"I furnished the money from the beginning for this crop. The boys had no money at all. I went on and furnished the money, and got ready to treat the worms and take care of the crop. Next went on and harvested the crop up to— Sent three car loads of sugar beets. Then we stopped. We didn't think it would pay to harvest the balance just at that time. Prior to that time, of course, this contract was assigned over to me. I went up to Kalamazoo after shipping three car loads, and saw Mr. Henry, the secretary of the company, and I said to him: 'I don't believe it will pay to harvest the balance of the beets, 16 acres there, or 20 (we called it about 16, the balance); that the worms are bothering us very bad again on that piece in particular;' and he said: 'Mr. Constantine, if you don't think it will pay freight and expenses, why don't harvest them,—16 acres.' Of course, I didn't. Of course, I said we were all ready to go ahead, and would

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harvest them if he desired to have me; but the opinion was of those on farms there that it would not pay, I told him. I told him about the matter, and left it to him to say whether we should go on and harvest them. He said 'No;' not to harvest them if I didn't think it would pay."

The original contract made by the company with Mr. Reitz contained an indemnity clause against loss. The crop was a failure. Plaintiff's suit is based upon this guaranty, and he recovered verdict and judgment for $1,318.74.

GRANT, J. (*after stating the facts; dissenting*). 1. It is due to the defendant to say that the version relied upon by the plaintiff is contradicted by Mr. Henry, its agent. But the question must be determined by the case made by plaintiff's testimony as above given. Under his version of it, two contracts were made,—one with Keys and Constantine, the other with plaintiff. Plaintiff says he represented Keys and Constantine, and was acting for them as well as for himself, in this interview with defendant's agent.

Defendant sent agents through the country in the vicinity of its factory to obtain contracts. In all, about 1800 were made. All the contracts but three contained the provision absolutely prohibiting its agents from changing or altering the terms and conditions thereof after they were executed and a copy delivered to each party. Under plaintiff's theory, it would be impossible to make a binding contract of this character. There is not one word of evidence in this case tending to show any authority conferred by the board of directors upon Mr. Henry, their agent, to make such changes. On the contrary, there is uncontradicted evidence in the contract itself that no such authority was conferred upon him. It would also follow that any of the agents who took any of these contracts had the power to change them. The very purpose of such provisions is to remove all doubt as to the agent's authority. Plaintiff knew of this provision when he claims to have made the parol change. He is a lawyer. It was incum-

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bent upon him to ascertain whether Mr. Henry had such authority, especially in the face of the express provision, known to him, that he did not possess it. It was incumbent upon plaintiff to prove the authority. There is no opportunity to apply the doctrine of apparent authority. Authority on the part of an agent to make a contract does not imply the authority on the part of the same agent to change it after he has reported and delivered it to his principal. Even Mr. Henry's statement to the plaintiff that he had authority would be no evidence of such authority. Mechem, Agency, §§ 706, 716; *Dobson* v. *More*, 62 Ill. App. 435; *Boynton* v. *Gaslight Co.*, 124 Mass. 197; *Davis* v. *Railroad Co.*, 131 Mass. 258 (41 Am. Rep. 221); *Simmons Hardware Co.* v. *Grocer Co.*, 64 Mo. App. 677; *Stoystown, etc., Road Co.* v. *Craver*, 45 Pa. St. 386; *Humboldt Mining Co.* v. *American Manfg. Co.*, 10 C. C. A. 415, 62 Fed. 356. The offer to show by Mr. Henry that he had no such authority was erroneously excluded by the court.

It is, however, urged that the defendant has had the benefit of this contract, and is therefore estopped to deny the authority of its agent. The complete reply to this is that there is no evidence that the defendant's directors had any knowledge whatever of this change. They had before them the written contract alone of Keys and Constantine, and had the right to act upon that contract as the measure of their rights and obligations. They had no notice that Keys and Constantine were acting under a subsequent parol agreement, and could not be estopped or bound by any such arrangement until they had knowledge of it. The learned counsel for plaintiff seek to bring the case within cases upon insurance policies, like that of *Beebe* v. *Insurance Co.*, 93 Mich. 514 (53 N. W. 818, 18 L. R. A. 481, 32 Am. St. Rep. 519). That case did not involve a change in the policy, but a waiver of conditions at the time the policy was given.

2. The contract to indemnify the plaintiff from all loss by reason of advances he already had made and should

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thereafter make to Keys and Constantine is an unusual one. It is not within the power of the most general agent of a corporation to make. Such extraordinary power must be proven to have been expressly conferred or its exercise ratified by the principal. As already stated, the defendant had its 1800 contracts in its possession, fully determining the rights of all the parties thereto, and on which it was prepared to carry on its business. It is now urged that its agent had the authority to guarantee to indemnify from loss parties who would furnish money to the beet growers to carry out their contracts. There is serious doubt whether the board of directors would have the power to make such contracts. See *Lucas* v. *Transfer Co.*, 70 Iowa, 541 (30 N. W. 771, 59 Am. Rep. 449); *Filon* v. *Brewing Co.*, 15 N. Y. Supp. 57; *Davis* v. *Railroad Co.*, *supra*. The fact that three of the original contracts contained a provision guaranteeing against loss is no evidence of authority on the part of the agent to make this contract with the plaintiff. There is nothing in the record from which it can be implied that such authority was conferred upon Mr. Henry, or its exercise by him ratified.

Other questions are raised, but this disposal of the case renders it unnecessary to determine them.

Judgment should be reversed, and new trial ordered.

MOORE, J. I do not agree with the conclusion reached by Mr. Justice GRANT. The growth of sugar beets and the manufacture of beet sugar are comparatively new industries in this State. It is a matter of common knowledge that a beet sugar factory is an expensive plant, and depends upon a crop of sugar beets grown in its vicinity for its successful operation. It is also a matter of common knowledge that the market for a crop of sugar beets depends upon the proximity of a beet sugar factory, and that farmers would not think of growing a crop, as they do ordinary crops, without knowing where it is to be marketed, and approximately at what price. It is also a mat-

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ter of common knowledge that contracts are made for the crop before it is planted, and, to insure a crop in some locations, the corporation itself frequently grows the crop. It follows naturally that, unless the farmer could feel a reasonable degree of assurance that his crop would be profitable, he would not engage in growing it. What is more natural than that the assurance should come from the corporation owning the plant which is to convert the crop into sugar? I cannot believe it is the exercise of an extraordinary power for the manager of one of these institutions, who, it is fair to presume, has special knowledge of the quantity and quality of the beets which may be ordinarily grown upon a given acreage, to say to a farmer who never has grown beets that the crop is a profitable one, and the company will gurantee him against loss if he will undertake to grow a crop, and to bind the company by such an agreement, when acted upon. It is difficult to see how the business could go on at all unless the manager and secretary are clothed with power to make such reasonable contracts as will result in the growth of the necessary crop to supply the ordinary needs of the plant. In *Whitaker* v. *Kilroy*, 70 Mich. 635 (38 N. W. 606), it is said:

"Mr. Brandon is shown by the testimony for plaintiff to have been the superintendent to do the general work and to keep the books. He is also described as superintendent and manager, and is testified to have made the contract with Mr. Kilroy on which the charges were all based. It also appeared that Kilroy's name nowhere appeared on the company's books as owing it anything. We think that persons dealing with such a corporation for work have a right to get their information from the person whom the corporation has put in charge, and cannot be required to go elsewhere, and that contracts so made are valid contracts, when relating to the ordinary concerns of such business. And if persons are not sustained in contracting with such superintendents, they can never be safe. They have no means of knowledge except inquiry somewhere, and the person put by the corporation in open charge of the business must have power, as to third persons, to represent it."

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See, also, *Ceeder* v. *Lumber Co.*, 86 Mich. 541 (49 N. W. 575, 24 Am. St. Rep. 134); *Hirschmann* v. *Railroad Co.*, 97 Mich. 384 (56 N. W. 842).

The question of the measure of damages, presented by counsel, has been considered by the court. We think the trial judge properly charged the jury in relation thereto.

A more troublesome question is whether the minds of Mr. Constantine and Mr. Henry met, so as to constitute, in law, a contract. When this conversation was had (and, for the purposes of the case, it must be assumed that Mr. Constantine's version is the correct one), Mr. Constantine knew the company had guaranteed Mr. Reitz against loss, and Mr. Henry also knew it; and the plaintiff refused to go any further with the business unless the parties were indemnified to the extent that Mr. Reitz was, and, upon the assurance of being so indemnified, the further expenditures were made by the plaintiff. We do not think the company can be heard to say, under these circumstances, that no contract was made.

The judgment should be affirmed.

HOOKER, C. J., MONTGOMERY and CARPENTER, JJ., concurred with MOORE, J.

O'NEIL v. NEWMAN.

1. APPEAL—ASSIGNMENTS OF ERROR—GENERALITY.
   An assignment of error that "the court erred in admitting improper evidence to go to the jury on the part of the plaintiff" does not comply with the rules, and will not be considered.

2. PLEADING—EVIDENCE—VARIANCE—DOGS.
   In an action for killing "a certain beagle hound dog," a motion to take the case from the jury because the evidence showed the dog to be part fox and part beagle hound was

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properly denied, where the defendant did not object to the testimony, and admitted by his counsel that he killed the dog.

3. SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY.

Where, in an action for killing a dog, defendant claimed the dog was a trespasser and chasing his sheep, and one of plaintiff's witnesses testified that he saw defendant kill the dog, and that there were no sheep in the inclosure, but they were in an adjoining inclosure, feeding, the case was properly submitted to the jury.

Error to Charlevoix; Mayne, J. Submitted January 13, 1903. (Docket No. 32.) Decided March 23, 1903.

Case by Thomas O'Neil against Austin C. Newman for killing plaintiff's dog. From a judgment for plaintiff, defendant brings error. Affirmed.

Ira G. Mosher, for appellant.

Fitch & Fitch, for appellee.

MOORE, J. This suit was commenced in justice's court. Plaintiff sued and obtained judgment for the value of a dog killed by defendant. It was appealed to the circuit court by defendant, where a jury gave the plaintiff a verdict of $12. The defendant has brought the case here by writ of error.

Many of the assignments of error are of as general a character as the following: "The court erred in admitting improper evidence to go to the jury on the part of the plaintiff." These assignments of error do not comply with the rules, and will not further be referred to. See Cir. Ct. Rule 47; Sup. Ct. Rule 11; *Tupper* v. *Kilduff*, 26 Mich. 394; *Wheeler & Wilson Manfg. Co.* v. *Walker*, 41 Mich. 239 (1 N. W. 1035); *Alberts* v. *Village of Vernon*, 96 Mich. 549 (55 N. W. 1022); *Hecock* v. *Van Dusen*, 96 Mich. 573 (55 N. W. 1024); *Jackson Bridge & Iron Co.* v. *Insurance Co.*, 122 Mich. 433 (81 N. W. 265); *Pichler* v. *De Hate*, 125 Mich. 247 (84 N. W. 138); *Thompson* v. *Street-Railway Co.*, 125 Mich. 249 (84 N. W. 132).

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It is assigned as error that the judge refused to take the case from the jury on account of a variance between the declaration and the proofs. In the declaration the dog which was killed was described as "a certain beagle hound dog." Defendant pleaded the general issue, and gave notice by way of defense that plaintiff's dog was trespassing on defendant's premises, and was chasing and worrying the sheep and lambs of defendant. There was a trial in justice's court upon the merits. Upon the trial in the circuit court plaintiff testified that he was the owner of a beagle hound fox dog, part fox and part beagle. No objection was made to the admission of this testimony. Later a witness produced on the part of the plaintiff, who knew his dog, was giving testimony relating to the way in which defendant killed it, when counsel for defendant stated, "We admit killing the dog." After the proofs were closed on the part of the plaintiff, defendant moved the court to take the case from the jury, because the proofs show the dog which was killed was a cross between the beagle and common hound, while the declaration is for the killing of a beagle hound dog. This motion was overruled. There is nothing in the record to show that a dog such as the proof discloses this one was would not properly be described when designated as a beagle hound dog. As already stated, the testimony of plaintiff was allowed to come in without objection, and the defendant admitted in open court the killing of the dog described by plaintiff. He was not misled by the pleadings or surprised by the proofs. We do not think the court erred in overruling the motion.

It is said there is no evidence to support the finding of the jury. We cannot agree with this claim. Defendant claimed the dog was a trespasser on his premises, and was chasing or worrying his sheep and lambs. At least one of the witnesses for plaintiff, who saw the defendant kill the dog, testified that there were no sheep and lambs in the inclosure where the dog was killed; that they were in an adjoining inclosure, and were feeding. An issue of fact

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was presented by the testimony, which was properly left to the jury.

Plaintiff claims the appeal is vexatious, and asks for additional costs. We are not satisfied the appeal is vexatious, and decline to give additional costs.

Judgment is affirmed.

The other Justices concurred.

TRACEY *v.* TOWNSHIP OF SOUTH HAVEN.

1. DEFECTIVE HIGHWAYS—NEGLIGENCE—QUESTION FOR JURY.
   Evidence that for the whole spring, and until May 1st, the time of plaintiff's injury, a washout existed in the highway, and that for a period of two years previous, when it had been raining, washouts occurred at or near the same place, warranted the inference that the township had knowledge of the condition of the highway, and justified the submission of the question of its negligence to the jury.

2. SAME—CONTRIBUTORY NEGLIGENCE.
   One driving a horse accustomed to shy at objects in the highway, and paying no attention to the road, but admiring the scenery, is guilty of contributory negligence in driving along a narrow and high embankment into a washout in plain view.

Error to Van Buren; Carr, J. Submitted January 14, 1903. (Docket No. 36.) Decided March 23, 1903.

Case by Addie M. Tracey against the township of South Haven for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

Wicksall & Cogshall (*Dallas Boudeman*, of counsel), for appellant.

Thomas J. Cavanaugh, for appellee.

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CARPENTER, J. The action in this case is brought to recover damages on account of injuries received by the plaintiff while she was driving over a public highway in the township of South Haven. Plaintiff's testimony tended to show the following facts: She is a woman 45 years of age, and by her injuries was permanently disabled. On the morning of May 1, 1899, she, with her husband, started from their home to the place of Mr. Voorheis, where Mr. Tracey was at work as a carpenter. They were the owners of a horse which had been driven by the family for many years single, and was used as a family horse. On the morning in question the plaintiff's husband harnessed the horse to the buggy. It was a gentle horse, and had been used a great deal by the plaintiff and her husband and their daughters. Plaintiff and her husband were driving together, and, when they arrived at the place where he was at work, he got out, and she drove on alone in a westerly direction, which leads to the village of South Haven. In doing so she was obliged to pass over the highway where she was injured. This highway extended east and west through the center of sections 1 and 2 in South Haven township, and where the injury occurred said highway crosses a ravine about 15 rods in width. Said ravine extends north and south, and is crossed by the highway in an easterly and westerly direction. The roadbed crossing said ravine is from 15 to 18 feet high, and from 8 to 12 feet wide at the top. There is a large hill on each side of the ravine, which slopes at an angle of about 45 degrees towards the ravine. On the sides of the roadbed where it crosses the ravine there were originally barriers, but in that part of the highway lying directly outside the village limits these barriers were permitted to decay, rot, and fall over. There existed in this roadbed, where it crosses said ravine, a washout from one to two and a half feet deep, and about two feet in diameter. This washout could be seen four or five rods away by those approaching it from either direction. It had been there during the whole spring, and it continued to grow worse

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from time to time. In fact, the evidence tended to show that for at least two years previous to the time of the accident, when it had been raining in the fall and spring, washouts occurred at or about the place where the plaintiff was injured. While the plaintiff was driving over, upon, and along this roadbed where it crosses the ravine, driving her horse at a walk, her horse became frightened at the washout, and stepped to one side. In doing so the bank of the road gave way, and, in endeavoring to regain his foothold, the horse, buggy, and all rolled down the embankment, and the plaintiff received the injuries complained of. Plaintiff recovered before a jury, and defendant appeals.

The defendant insisted on the trial, and insists here, that a verdict should have been directed in its favor, because plaintiff was guilty of contributory negligence, and because the evidence failed to show any such neglect on the part of the township as would render it liable. We are all agreed that the evidence warranted the inference that the washout had existed so long that the township officers must have known of it before the plaintiff's injury, and therefore that the question of defendant's negligence was properly submitted to the jury, under the authority of *Thomas* v. *City of Flint*, 123 Mich. 10 (81 N. W. 936, 47 L. R. A. 499).

The serious question in the case, however, is whether or not plaintiff's own testimony warranted the finding that her negligence did not contribute to her injury. The determination of this question requires a careful examination of that testimony. On direct examination plaintiff testified:

"As I was driving along, admiring the ravine very much, suddenly the horse first kind of shied, stepped one side, and at the same time I noticed the wheel was on the verge of going into this rut. * * * My wheel was far out as I discovered it * * * as the horse shied; and at the same time I discovered that the wheel was on the outside in the washout, and just ready to drop down. * * * At the same time the horse shied I saw the

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whole thing, and yanked on the lines suddenly. At the time he shied he stepped one side, stepped outside of the track, and it caved off, and, when he stepped back to save himself from going down the bank, the buggy got the upper hand of me, and he went down the bank. * * * We were so far to this side that he nearly, I think, stepped in the hole himself. I didn't notice him, because he was so gentle that it was very seldom that I had to pay any attention to him."

That the horse was the family horse, and had been driven by plaintiff and her daughters for years.

On cross-examination plaintiff stated that she was driving along, admiring the ravine, its depth, its green groves, and the blossoms on the trees.

"The morning was a very fine one, not cloudy. * * * The first thing I knew about the washout, the horse shied. * * * At this time I was right at the edge of it. * * * When the horse shied, I pulled on the lines. Up to the time that he shied, the lines were loose to a certain extent. We always drive him with a loose line; not overly loose, but yet not with a tight rein. The lines were not lying on the dashboard at the time."

She also testified that the horse had shied at ruts or bad places in the road prior to this.

"I don't know as the horse ever came so near stepping into a hole that I didn't notice before I got to it, and I was looking out for it; but as it happened this morning, I didn't see that one. * * * I didn't happen to be looking down at the road directly. I didn't think of such a thing."

That she was looking at the blossoms, and consequently did not notice the hole; that the horse had often shied at paper; that he had shied at a road machine, at ladies dressed in white, at cars or engines, at logs half covered with snow, at domestic animals in the track, at a gentleman carrying a harness. When he shied "he was easy to manage, though. If not reined up, he would shy off half the width of the road, probably."

The law in this State is well settled that, to entitle plaintiff to recover, the burden rests upon her not only to estab-

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lish defendant's negligence, but to prove that she herself was not guilty of contributory negligence. *Drew* v. *Steamboat Chesapeake*, 2 Doug. 33; *Lake Shore, etc., R. Co.* v. *Miller*, 25 Mich. 274. The circumstances, as detailed by plaintiff,—this narrow, high embankment, the horse accustomed to shy,—clearly imposed upon her some degree of care. Her testimony does not warrant the inference that she exercised any care whatever, either in watching the horse or observing the highway. While it is generally a question for the jury, and not for the court, as to what care should be exercised, this court is bound to say that no care is not due or reasonable care. *Lake Shore, etc., R. Co.* v. *Miller*, 25 Mich., at page 294. This is not like the cases of *Dundas* v. *City of Lansing*, 75 Mich. 499 (42 N. W. 1011, 5 L. R. A. 143, 13 Am. St. Rep. 457); *Lowell* v. *Township of Watertown*, 58 Mich. 568 (25 N. W. 517); *Graves* v. *City of Battle Creek*, 95 Mich. 266 (54 N. W. 757, 19 L. R. A. 641, 35 Am. St. Rep. 561); *Sias* v. *Village of Reed City*, 103 Mich. 312 (61 N. W. 502); *Grattan* v. *Village of Williamston*, 116 Mich., at page 465 (74 N. W. 668); and *Vergin* v. *City of Saginaw*, 125 Mich. 499 (84 N. W. 1075),—where the injured party introduced testimony tending to excuse him for receiving an injury from a known defect in a highway. In this case the defect was not known to plaintiff, but it was open to her observation, had she paid any heed to her surroundings. It is urged that this court should not declare a rule which requires the driver of a vehicle to keep his eye constantly on the roadbed in front of his horse, or which will prevent his enjoying, to some extent, the beauty of the surrounding scenery. This opinion declares no such rule. It simply recognizes that, under the circumstances of this case, plaintiff was under an obligation to use some care. Her testimony fails to show that she used it, and presents no excuse for such failure.

Judgment is reversed, and a new trial granted.

The other Justices concurred.

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CRON v. TOLEDO & MONROE RAILWAY.

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ELECTRIC RAILWAYS—INJURY TO EMPLOYÉ—WARNING OF DANGER.

An electric railway company is not liable for the death of an employé, killed by a contact with the fuse block on a switchboard, where the evidence shows he was warned of the danger.

Error to Monroe; Lockwood, J. Submitted January 15, 1903. (Docket No. 46.) Decided March 23, 1903.

Case by Emilie Cron, administratrix of the estate of Adam Cron, deceased, against the Toledo & Monroe Railway, for the alleged negligent killing of plaintiff's intestate. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Willis Baldwin and *John O. Zabel*, for appellant.

Charles A. Golden, for appellee.

MOORE, J. This suit was brought to recover for the death of plaintiff's decedent. The defendant was constructing a line of electric railway between the cities of Toledo and Monroe and a power house at Monroe. It let a contract to the Toledo & Monroe Construction Company to do this work, and the construction company contracted with the J. G. White Company for the construction of the power house and installing of the machinery therein. The railway was substantially completed, and a part of the machinery had been installed. The road was in operation, using the machinery which had been installed. The J. G. White Company was completing the work at the power house. Mr. Cron was at work, boxing up holes in the floor. He had worked at this 2½ days, and had nearly finished, when he was killed by reason of his face coming in contact with some part of the fuse block on the back of the switchboard while his hand rested upon an iron beam,

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thus "grounding" a strong current of electricity through his body. The negligence charged in the declaration was that the defendant failed to warn the deceased of the latent dangers which he might encounter in doing this work. The court directed a verdict for the defendant. The case is brought here by writ of error.

Many questions are raised by counsel which we do not deem it necessary to discuss, as the determination of one of them must dispose of the case. The record discloses without contradiction that, before the deceased came to his death, he was warned of the danger, and cautioned as to what he might not do. Mr. Keller, the engineer in charge, testified at great length as to the warnings he had given. Among other things he testified:

"He was just getting up the lumber. I went over everything again with him,—the dangerous parts that I considered dangerous for a man that did not know anything about wiring,—because I knew there were only two places in particular that were in any way dangerous at all to a man not familiar with the work. I pointed out these two places, and told him he should not handle these wires at all. If he wanted to remove the wires, he was to come to me and ask if he was to move them. The following day he came into the office, and asked me to go back of the switchboard. I did so. I noticed a wire apparently close to the return circuit from the rail. It was very close to the west one that he had to box. I said I would remove it so that he could go ahead. I took a piece of board and pried the wire away. He wanted to assist me; he asked to assist. I refused. There was another wire in the way. I removed it with my hands. It was insulated. He went ahead with the work. I cautioned him. I went back of the switchboard every few hours during the day,—perhaps every hour. * * *

"*Q.* Just state what you said to Mr. Cron about the danger back of the A. C. panel.

"*A.* He was working there on one end. I called his attention to these dangerous places, which I considered dangerous for him to work around, and which is not very dangerous for us familiar with the switchboard, because it is usual with the apparatus back of the board. I called him over from one end of the work and told him. I said, 'This is hot.'

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"*Q.* You mean the wire?

"*A.* Yes, sir; I said: 'This is warm. There is power going through there. You must not get anywhere near this.' I could not make it any stronger,—my caution to him. I had already cautioned him.

"*Q.* Tell us, as near as you can, what you said about the caution.

"*A.* I placed my hand near the wire, and said: 'This is hot. It is very dangerous. Must be very careful here.' That is practically what I said. Then I stepped over to the other one. I also cautioned him at that place. I said it was equally as dangerous.

"*Q.* The whole substance of your caution was that there were live wires there; that it was dangerous there,—not to touch it?

"*A.* Yes, sir.

"*Q.* That was the substance of the caution you gave him?

"*A.* Yes, sir.

"*Q.* That is substantially the caution you gave him?

"*A.* I cautioned him the day before. I told him that he should not touch the wires anywhere. If there were any wires to move, I would attend to them; if he thought it was too dangerous to work there, I would rather have him stop right there. At the place he was killed I cautioned him again.

"*Q.* Was the caution you gave him the day before substantially to the effect as you have stated, and this caution about the live wire at this place where he was killed is the gist of all the caution you gave him?

"*A.* Yes, sir.

"*Q.* You may state whether or not you called Mr. Cron's attention to everything that was dangerous where he was to do his work.

"*A.* I called his attention to every dangerous point that I thought was dangerous to him. I called his attention to the fact that he should look out and be careful in doing his work. I went from one end of the switchboard to the other, and pointed out every dangerous place."

Mr. Lewis, chief engineer in charge of the machinery, also testified to having warned Mr. Cron of the danger, to showing him the fuse block, and to pointing out to him the fuse wire where his head was when he was found dead, and to explaining to him the danger. It is claimed these

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statements are discredited by other testimony given by the witnesses and by the circumstances surrounding the case. To sustain this claim it is necessary to take isolated questions and answers separated from what preceded and followed them. When these questions and answers are read in connection with the rest of the testimony, they are not inconsistent with it, and do not discredit it. The case is very different from that of *Preuschoff* v. *Brewing Co.*, *ante*, 107 (92 N. W. 945), as will be seen by a reference to that case. In this case the testimony of all the witnesses was to the same effect, and was not open to doubt. See *Druse* v. *Wheeler*, 26 Mich. 189; *Conely* v. *McDonald*, 40 Mich. 150, and the many cases there cited; *Lange* v. *Perley*, 47 Mich. 352 (11 N. W. 193); *Jakoboski* v. *Railroad Co.*, 106 Mich. 440 (64 N. W. 461); *Ferris* v. *Assurance Co.*, 118 Mich. 485 (76 N. W. 1041).

The judgment is affirmed.

The other Justices concurred.

CRONIN *v.* RUSSEL WHEEL & FOUNDRY CO.

1. MASTER AND SERVANT — PERSONAL INJURY — ASSUMPTION OF RISK.

   Where an experienced workman, familiar with the work, while engaged in constructing a hoisting apparatus for unloading coal from a vessel, fell from a platform which he had assisted in building, the danger of working in the place, if any, was as apparent to him as to any one, and the risk, if any, was assumed by him.

2. SAME—SAFE APPLIANCES.

   Where an experienced workman, familiar with ropes and their uses, selects, from a pile of ropes at hand, one which breaks and causes him to fall, the master is not liable.

Error to Wayne; Donovan, J. Submitted January 15, 1903. (Docket No. 51.) Decided March 23, 1903.

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Case by George Cronin against the Russel Wheel & Foundry Company for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

James H. Pound, for appellant.

Edwin F. Conely and *Orla B. Taylor*, for appellee.

MOORE, J. This is an action brought by the plaintiff against the defendant for damages sustained by him, claimed to be caused by being furnished an unsafe instrument with which to work in a dangerous place. The trial court directed a verdict for defendant. The sole question is whether it should have been submitted to the jury.

The defendant company was engaged in constructing for the Detroit Gas Works an apparatus for hoisting coal out of vessels at the dock and unloading it. The plaintiff had been in the employ of defendant for two months before he was injured. He had worked for it prior to his last employment. He had done work of a like character for a long time. He had, according to his own testimony, assisted in the erection of buildings where structural ironwork was used. He had assisted in hoisting ironwork up and down with blocks and tackle; had helped to put the iron in place; had pulled on the rope running through the tackle-block; had helped to bolt the ironwork together; had done anything that was necessary, from helping lift the various iron pieces from the ground to putting them into their places in the permanent structure. He had occasion, while pursuing his work, to frequently go upon platforms, both permanent and temporary. He had frequently been called upon to use tackle-blocks, pulleys, and ropes. In pursuing his work he was employed in the construction of high buildings like the Majestic Building, the Leonard & Carter Building, the Masonic Temple, and the Union Trust Building.

At the time of the injury to plaintiff, Mr. Burns, who had charge of the plaintiff, and two others, went up to a

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platform that was 20 or 30 feet from the ground, supported upon timbers 10 or 12 inches square. In doing the work it became necessary to draw a wire rope or cable, over which the cars which were to convey the coal would pass, so it would be taut. There were upon the platform quite a number of ropes,—the plaintiff testified, six or seven kinds. He selected from the number a rope three-quarters of an inch to an inch in diameter, which, by the direction of Mr. Burns, was passed by the plaintiff around the end of a 2-inch plank, which was 10 to 14 inches wide, and 16 or 18 feet long. Mr. Burns did the same thing at the other end, and the plank was lowered below the platform, the ends resting upon cross-pieces fastened to the timbers supporting the upper platform, making a temporary platform of the plank, it being held in place by its own weight. The rope used by Mr. Cronin was dropped upon the platform, but was soon handed to him by Mr. Burns, and by his direction was thrown by plaintiff three times around a truss attached to the timbers that supported the platform, and tied with a square knot. Plaintiff then put a hook attached to a tackle-block over two turns of the rope he had attached to the truss. The other hook of the block and tackle was attached near the end of the wire cable which was to be tightened. Mr. Burns and the plaintiff stood upon the plank they had lowered from the platform, and the other two men on the upper platform. When the hooks were attached as described above, all the men pulled upon the rope passing through the tackle-block, pulling the wire cable taut. Mr. Burns, in addition to pulling upon the rope, took up the slack. Finally, in the effort to tighten the wire cable, the rope which was put around the truss by the plaintiff broke, and he was precipitated to the ground, and injured severely.

Was the defendant liable because of the condition of the temporary platform? There was no evidence it was not the kind of a platform usual for work to be done under such conditions. The plaintiff was familiar with the kind of work he was to do. He helped to build the platform.

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If there was any danger in working upon it, the danger was as apparent to him as to any one, and the risk, if any, was assumed by him. *Manning* v. *Railway Co.*, 105 Mich. 260 (63 N. W. 312); *Lamotte* v. *Boyce*, 105 Mich. 545 (63 N. W. 517); *Findlay* v. *Foundry Co.*, 108 Mich. 286 (66 N. W. 50); *Sakol* v. *Rickel*, 113 Mich. 476 (71 N. W. 833); *Soderstrom* v. *Lumber Co.*, 114 Mich. 83 (72 N. W. 13); *Pilucki* v. *Spring Works*, 117 Mich. 111 (75 N. W. 295); *Juchatz* v. *Alkali Co.*, 120 Mich. 654 (79 N. W. 907); *Rohrabacher* v. *Woodard*, 124 Mich. 125 (82 N. W. 797), and the cases there cited.

Is there liability because the rope broke? The rope was taken out of a pile of ropes immediately at hand, by the plaintiff himself, according to his testimony, and according to all of the testimony in his immediate presence. He knew for what purpose the rope was to be used. He was familiar with ropes and their uses. Under such circumstances it has been repeatedly held the master is not liable. *Allen* v. *Iron Co.*, 160 Mass. 557 (36 N. E. 581); *Maloney* v. *Rubber Co.*, 169 Mass. 347 (47 N. E. 1012); *Rawley* v. *Colliau*, 90 Mich. 31 (51 N. W. 350); *Kehoe* v. *Allen*, 92 Mich. 464 (52 N. W. 740, 31 Am. St. Rep. 608); *Thomas* v. *Railroad Co.*, 114 Mich. 59 (72 N. W. 40).

Judgment is affirmed.

The other Justices concurred.

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RHODE v. METROPOLITAN LIFE-INSURANCE CO.[1]

1. LIFE INSURANCE—EVIDENCE—HEALTH OF APPLICANT.
In an action on a life-insurance policy, the statement of the examining physician, a representative of the company, made at the time of the examination, that, in his opinion, the applicant was in good health, is admissible against the company

[1] Rehearing denied May 29, 1903.

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to show that the decedent was in good health at the time the policy took effect.

2. SAME—PRIOR APPLICATION—KNOWLEDGE OF INSURER.
Where the agent's certificate on an application for life insurance refers to a former application, and there is indorsed on such certificate, at the home office, the number of the prior application, it will be presumed that the company had knowledge of what the first disclosed.

3. SAME—WARRANTY—ATTENDANCE BY PHYSICIAN.
The fact that an applicant for life insurance had been attended by a physician for a mere temporary ailment will not render void a policy based upon an application stating that he had not been attended by a physician.

4. TRIAL—INSTRUCTIONS—UNCONTRADICTED EVIDENCE—HARMLESS ERROR.
A charge by the trial judge that he would leave the jury to determine whether they would believe uncontradicted testimony is not prejudicial error where there was no material point wholly uncontradicted.

Error to Wayne; Frazer, J. Submitted February 5, 1903. (Docket No. 71.) Decided March 23, 1903.

Assumpsit by Minnie Rhode against the Metropolitan Life-Insurance Company on a policy of insurance. From a judgment for plaintiff, defendant brings error. Affirmed.

Haug & Yerkes, for appellant.

Bowen, Douglas & Whiting and *J. O. Murfin*, for appellee.

MONTGOMERY, J. This case has once been before the court, and is reported in 129 Mich. 112 (88 N. W. 400). On a second trial the plaintiff again recovered, and the defendant brings error.

It is again argued by counsel for the defendant that there was no evidence tending to show that the decedent was in good health at the time the policy took effect. It is strenuously argued that there was no sufficient evidence to raise a question of fact for the jury upon this point, as

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the testimony of Dr. Lawton was an expression of opinion as to the condition of the applicant. We think the question is foreclosed by the holding of the former case, and, were it not, we see no reason to depart from the conclusion there stated. Nor can we add to the force of the suggestions contained in the former opinion, and in the authorities quoted.

The application in this case stated that the insured never had bronchitis, and it is insisted that the evidence shows that he had bronchitis in May, 1899, and in June, 1899. The evidence that he had bronchitis in June, 1899, is that of Dr. Flintermann, who examined him on behalf of the company in June, 1899. The evidence shows that this application was reported to the company, and that the medical report contained a statement that he believed that the applicant had chronic bronchitis, and recommended a postponement, and that the applicant be re-examined in two months from that time. The application in the present case was reported by the agent, and, in answer to a question as to whether the applicant had ever made an application to this company on which a policy was not issued, it was stated, "Ordinary application postponed, July 21st;" and across this certificate—the usual certificate coming from the home office—appeared the number of the postponed application. The inference is therefore open that the attention of the home office was specifically directed to the former application. This presents a very different question than was presented on the former hearing of this cause, in which we held (following *Brown* v. *Insurance Co.*, 65 Mich. 306 [32 N. W. 610, 8 Am. St. Rep. 894]) that it was not incumbent on the defendant to take notice of any prior application and the contents thereof. Here it is shown that it actually did have notice of it, and the inference is irresistible that it was examined at the time this application was made, so that the company had before it whatever information existed upon the subject as to whether there was chronic bronchitis, to wit, the statement of the physician. We think it would be

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manifestly unjust now to predicate a defense upon an assumed want of knowledge. *Emlaw* v. *Insurance Co.*, 108 Mich. 554 (66 N. W. 469); *O'Rourke* v. *Insurance Co.*, 23 R. I. 457 (50 Atl. 834, 57 L. R. A. 496).

It is also claimed that the statement of the applicant that he had not been attended by physicians is shown to be materially false. But we think the question was fairly submitted to the jury as to whether the ailment for which the applicant was treated was a serious ailment, or a mere temporary difficulty. *Hann* v. *National Union*, 97 Mich. 513 (56 N. W. 834, 37 Am. St. Rep. 365); *Plumb* v. *Insurance Co.*, 108 Mich. 94 (65 N. W. 611).

The court charged the jury as follows:

"I refuse, and have always refused, to take cases away from a jury where there is any evidence upon a subject upon one side, even if there is no flat contradiction upon the other, but I believe it is my duty to leave that question to the jury to determine whether they will or will not believe even an uncontradicted witness; and I put that matter now so plain before you that there can be no mistake as to what the ground taken by the court is here, and that if I am wrong about it my position may be rectified by a court of superior authority."

It is fair to assume that the court considered that there was testimony in the case on some material point which was wholly uncontradicted. The point upon which it is said there was no contradiction was the testimony of Dr. Lyon to the effect that the applicant had bronchitis. We think that it cannot be said that this testimony was wholly uncontradicted, and therefore, while the statement of the court was somewhat heroic, it was error without prejudice.

The other questions raised are sufficiently covered by the foregoing discussion. We think no prejudicial error was committed, and the judgment will be affirmed, with costs.

The other Justices concurred.

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WHEELER v. BAKER.

1. ACCOUNT STATED—CONFESSION OF AMOUNT—ACCEPTANCE.
A confession by an agent that his arrearages amount to a certain sum does not constitute an account stated, where the principal does not accept the confession as a true statement of the account.

2. DEMAND—SATISFACTION BY PART PAYMENT.
An unliquidated demand can be satisfied by the payment of an amount smaller than its actual value.

3. SAME—CONSIDERATION.
A creditor who, in settling the amount of a disputed claim, agrees with the debtor upon a certain sum, and as a part of the agreement accepts a less sum in full payment, discharges the whole demand.

Error to Wayne; Donovan, J. Submitted February 18, 1903. (Docket No. 94.) Decided March 23, 1903.

Assumpsit by Hayden W. Wheeler, Hayden H. Butts, Oliver G. Fessenden, Walter N. Walker, and Willard H. Wheeler, copartners as Hayden W. Wheeler & Company, against Fred L. Baker, for money had and received. From a judgment for defendant, plaintiffs bring error. Affirmed.

Allan H. Frazer, for appellants.

Harry H. Wait (*Alex. J. Groesbeck*, of counsel), for appellee.

CARPENTER, J. During the year 1900 defendant was a traveling salesman in the employ of plaintiffs. He became short in his accounts, and on the 14th of October, 1900, plaintiff Fessenden obtained from him at Pittsburg, Pa., a written confession that his shortages amounted to the sum of $2,575.39, summarized as follows: Short on

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cash collected, $693.16; goods sold for cash, and unaccounted for, $1,327.16; goods given as discount, and charged to other parties, $236.44; goods given as discount, and not yet charged to anybody, $318.63. After this confession was obtained, defendant was permitted to do business for plaintiffs for a couple of days in Pittsburg. Mr. Fessenden then returned to his home in New York, and defendant to his in Detroit. Shortly afterwards, defendant, in response to a request from Mr. Fessenden, went to New York, and there, after several days spent in negotiation, the amount of defendant's shortage was agreed to be $2,656.53. The testimony of defendant affirms, and that of plaintiffs denies, that at the time this amount was fixed it was agreed that $1,328.27 would be accepted as full payment therefor. This $1,328.27 was paid by $1 in currency and by delivering to plaintiffs a check for the sum of $1,327.27, drawn by E. B. Baker, defendant's uncle, on the Fidelity Trust Company of Newark, N. J., to the order of defendant, and by him indorsed; defendant testifying that this payment was made in pursuance of the agreement above stated, and plaintiffs testifying that it was a payment on account. This suit was brought to recover the balance of said arrearage, claimed to be unpaid. The issue made by this conflicting testimony was submitted to the jury, who found in defendant's favor.

Plaintiffs insisted in the court below, and insist here, that the amount of defendant's arrearages, having been converted into an account stated, could not be settled by the payment of a smaller amount than that agreed upon. If they are right in this, the judgment must be reversed. If they are wrong, it must be affirmed, because all the assignments of error relied upon relate to this question. The confession made by defendant in Pittsburg that his arrearages amounted to $2,575.39 was not an account stated. Plaintiffs did nothing to indicate their acceptance of that confession as a true statement of the account. On the contrary, they insisted, a few days afterwards, and

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defendant conceded, that it was not a true statement of the extent of defendant's arrearages. They insisted when this case was tried, and insist now, that it was not a true statement. It follows that, according to the record in this case, there was no agreed statement of account until the arrangement was made, if any was made, for its settlement. Until the arrearage of defendant was liquidated—that is, its amount definitely agreed upon—it could have been satisfied by the payment of an amount smaller than its actual value. *Tanner* v. *Merrill*, 108 Mich. 58 (65 N. W. 664, 31 L. R. A. 171, 62 Am. St. Rep. 687); *Kern Brewing Co.* v. *Royal Insurance Co.*, 127 Mich. 39 (86 N. W. 388). The legal question involved in this suit, then, is this: Is the settlement of an unliquidated demand rendered void because, when the agreement therefor was made, it was also agreed that the amount of said demand exceeded the amount to be paid to satisfy it? There can be but one answer to this question. Under this hypothesis, the agreement liquidating the account gave defendant the right to satisfy it by the payment of a smaller sum. Plaintiffs cannot rely on this agreement, and escape from its obligations. Nor can defendant be bound by one part of this agreement, and denied the right of insisting upon another.

The judgment of the court below is therefore affirmed, with costs.

The other Justices concurred.

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LORD *v.* DETROIT SAVINGS BANK.

1. REAL ESTATE—FIXTURES—PURCHASER AT FORECLOSURE SALE.
   A cupola and crane, bricked up and built into a building by the owner, were real estate, and passed to the purchaser at a foreclosure sale of the real estate, as against one who obtained a bill of sale of them pending the foreclosure, where it appeared that their value would have been impaired by their removal, and without them the building would not have been in condition for immediate use.

2. SAME—ANNEXATION—INTENT—EVIDENCE.
   The transfer of the crane and cupola pending the foreclosure, and long after their annexation to the realty, is inadmissible to show the intent with which they were annexed.

3. SAME.
   A verbal agreement between the agent of the purchaser at the foreclosure sale and the owner, just before the latter yielded possession, that such cupola and crane might be removed by the owner, does not prove that the mortgagees considered the property personalty at the time it was annexed.

4. FIXTURES—PERMISSION TO REMOVE—STATUTE OF FRAUDS.
   A verbal permission to remove fixtures, given by the purchaser at a foreclosure sale to the owner, cannot change realty into personalty.

Error to Wayne; Donovan, J. Submitted February 18, 1903. (Docket No. 97.) Decided March 23, 1903.

Trover by Franklin L. Lord against the Detroit Savings Bank and others. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Affirmed.

Franklin L. Lord, in pro. per.

Charles T. Alexander, for appellees.

CARPENTER, J. Plaintiff brought an action to recover of the defendants damages for the conversion of a cupola

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and crane which were bricked up and built into a building by the owner of said building. Subsequently defendants acquired the ownership through a purchase at the foreclosure of a purchase-money mortgage executed by said owner. Some months after possession was so acquired, plaintiff, who had, while the foreclosure suit was pending, obtained a bill of sale of the cupola and crane, demanded possession of the same, and, on defendants' refusal to comply with this demand, instituted this suit. The trial court directed a verdict for the defendants, giving, as one of his reasons therefor, that the property in dispute was realty, and on the foreclosure of the mortgage became the property of the defendants.

We think this decision was correct. The testimony of the plaintiff not only showed an attachment in a permanent manner by the owner of the realty, but it also showed that the value of the cupola and crane would be impaired by their removal, and that without them the building in which they were would not be in condition for immediate use. Under these circumstances, the cupola and crane became a part of the realty. *Coleman* v. *Manufacturing Co.*, 38 Mich. 30; *Lyle* v. *Palmer*, 42 Mich. 314 (3 N. W. 921); *O'Brien* v. *Kusterer*, 27 Mich. 289; *Wickes Bros.* v. *Hill*, 115 Mich. 333 (73 N. W. 375).

Plaintiff contends that whether or not these fixtures became part of the realty depends upon the intent of the parties, and that the fact that they were transferred as personal property to the plaintiff is evidence of that intent. We do not think this sale afforded any such evidence. If this property is part of the realty, it became so at the time it was annexed thereto. A declaration on the part of its owner, not made at the time, but long afterwards, would clearly be inadmissible to prove the intent with which said annexation was made. Made, as it was in this case, after the foreclosure suit was commenced, it was a mere self-serving statement.

Plaintiff contends that the following evidence warranted

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a finding that the property in question was personalty: Just before the owners yielded possession of the real estate and buildings, defendants gave them written permission to remove certain machinery and tools, but not the property in controversy. On the back of said permission, one of the defendants (an agent of the purchaser at the mortgage sale) made this indorsement:

"Full possession of factory to be given in five days; * * * it being understood that full possession of foundry [in which the cupola and crane were located] is to be given in fifteen days."

The purpose of this indorsement was to give further time for the removal of the cupola and crane, which said agent verbally agreed might be removed. Subsequently said agent verbally agreed that said cupola and crane could remain and be sold to an incoming tenant. At the time possession of the property was demanded, there was talk on the part of the agents of the owners of purchasing the same, and of making a charge for storage; and they refused to deliver the property in controversy, upon the ground that the owner had forfeited his rights therein by leaving it there too long. This testimony, in our opinion, has no tendency to prove that the mortgagees and purchasers thereunder considered the property in question personalty at the time it was annexed. Neither has it any legal effect as an agreement to change property, which in its nature is realty, into personalty. 2 Reed, Stat. Frauds, § 714; *Wetmore* v. *Neuberger*, 44 Mich., at page 365 (6 N. W. 838); *White* v. *King*, 87 Mich. 111 (49 N. W. 518).

The judgment is affirmed.

The other Justices concurred.

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SCHWARTZ v. WOODRUFF.

1. LAND CONTRACTS—ASSIGNMENT OF INTEREST—CLOUD ON TITLE.
   A person who has purchased land on a contract, and entered into a written agreement with three persons, assigning to each an undivided one-fourth interest, cannot, upon obtaining a deed from the vendor, convey a perfect title to another who has notice of the assignment.

2. FORECLOSURE OF LAND CONTRACT—TITLE—NOTICE—ESTOPPEL.
   A vendee in a land contract, who, knowing of an imperfection in the title tendered him, refused to accept the conveyance, and pay the balance of the purchase price, solely on the ground that he did not have the money, cannot defeat a suit to foreclose the contract on the ground that the title tendered him was imperfect; but the decree should require the vendor to remove the cloud from the title.

3. DEEDS—ACKNOWLEDGMENT—NOTARY—INTEREST.
   A certificate of acknowledgment of a deed by a notary who is interested in the land does not render the deed void, as title would pass without an acknowledgment. *Brown* v. *McCormick*, 28 Mich. 219.

4. APPEAL—EVIDENCE—OBJECTION.
   A party who does not object to the admission of a deed in evidence because it was acknowledged before an interested notary cannot raise the question on appeal.

Appeal from Wayne; Rohnert, J. Submitted February 20, 1903. (Docket No. 111.) Decided March 23, 1903.

Bill by Charles Schwartz against Fremont Woodruff to foreclose a land contract. From a decree for complainant, defendant appeals. Modified and affirmed.

Walter E. Oxtoby (*Keena & Lightner*, of counsel), for complainant.

De Forest Paine, for defendant.

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CARPENTER, J. This was a suit brought to foreclose a land contract and obtain a decree for a deficiency against defendant. The court below rendered a decree in complainant's favor. Defendant appeals, asking a reversal, because complainant only owned an undivided interest in the land in question, and because the deed of complainant's grantor was acknowledged before an interested party.

The facts are undisputed, and may be briefly stated. The contract between complainant and defendant was made October 18, 1892, and obligated complainant to deliver to defendant, on the payment of the agreed purchase price, "a good and sufficient conveyance in fee simple, * * * free and clear of and from all liens and incumbrances, except such as may have accrued subsequent to the date hereof by or through the acts or negligence" of defendant. At the time of the execution of said contract, said complainant's title was that of a contract purchaser only, he having obtained, on May 1, 1891, his contract of sale from the owner of the land, Bishop Foley, of Detroit. Before making said purchase, complainant had a verbal understanding with Frank A. Schulte, William W. Hannan, and James T. Keena that he and each of them should have an undivided one-fourth in the property in question, and the next day after said purchase he and they entered into a written contract in accordance with said understanding. By this contract each of the four became an owner of a one-fourth interest in the property, and each obligated himself to carry out the provisions of the contract between complainant and Bishop Foley. In accordance with a verbal agreement between these four, Bishop Foley executed a deed October 24, 1892, transferring the title to complainant, the acknowledgment to which was taken before and certified by Mr. Keena as notary public. Defendant continued to make payments on his contract until October 10, 1901.

Before this suit was commenced, and after the agreed purchase price became due, complainant tendered defendant a deed of this land, and demanded payment of the

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balance due. Defendant refused to accept the conveyance and pay said balance on the sole ground that he did not have the money, though he had known for two or three years that Schulte, Hannan, and Keena had an interest in the venture, and was thereby charged with notice of their actual interest in the land. *Converse* v. *Blumrich*, 14 Mich., at page 120 (90 Am. Dec. 230). If the title tendered defendant was defective on account of the assignment of an interest in the land by complainant to Schulte, Hannan, and Keena, it was in the power of the complainant to comply with any objection on that ground, and perfect the title. As no such objection was made at the time of the tender, it would be inequitable to permit that objection to prevail now for the purpose of defeating this suit. When complainant commenced this suit, he had a right to assume that the title tendered by him was sufficient.

An injustice would, however, result to defendant if he were compelled to pay, as required by the decree appealed from, the difference between what can be obtained by the sale of a questionable title and what he has agreed to pay for a title which is free from question. The assignment to Messrs. Schulte, Hannan, and Keena clearly does cast a doubt upon the title tendered to defendant. The decree should be so modified as to require complainant to obtain from Messrs. Schulte, Hannan, and Keena a transfer of all their legal title to said property, reserving to themselves, if they choose, their right to an accounting from him. If the defendant does not pay the balance ascertained to be due within 30 days after said deed is filed in the office of the register of deeds, proceedings may be taken in conformity with said decree.

Relying upon *Groesbeck* v. *Seeley*, 13 Mich., at page 345, and *Laprad* v. *Sherwood*, 79 Mich., at page 524 (44 N. W. 943), defendant's counsel urges that the acknowledgment of Bishop Foley to his deed to complainant was void, because taken before Mr. Keena, who was an interested party. If this is true—which is by no means certain, as nothing passed to Mr. Keena by the deed, and as his

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rights in the property were, legally speaking, the same before the deed was made as afterwards—it would not impair the validity of the deed itself. Without any acknowledgment whatever, the title would pass. *Brown* v. *McCormick*, 28 Mich. 215, 219. At most this objection goes only to the admissibility of the deed in evidence. As defendant did not make this objection, or any objection which raised this question, when the deed was admitted in evidence by the court below, he cannot avail himself of it on this appeal.

The decree of the court below will be modified as indicated in this opinion, and affirmed. Defendant will recover costs in this court, and the complainant the costs of the court below.

HOOKER, C. J., GRANT and MONTGOMERY, JJ., concurred. MOORE, J., did not sit.

MATTESON *v.* MATTESON.

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1. CHANCERY COURTS—JURISDICTION—VALUE OF LAND—AMOUNT OF LIEN.

   In a suit in chancery by the owner of land to protect his land from a claim asserted against it, the value of the land, and not the amount of the claim, determines the jurisdiction of the court.

2. SAME—BILL IN AID OF EXECUTION.

   Where a creditor files a bill in aid of execution, the amount of the execution, and not the value of the land, determines the jurisdiction of the court.

Appeal from Gratiot; Stone, J. Submitted February 20, 1903. (Docket No. 109.) Decided March 23, 1903.

Bill by Isaac H. Matteson against Samuel Elias Matte-

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son and others in aid of execution. From an order overruling a demurrer to the bill, defendants appeal. Reversed.

Searl & Kress, for complainant.

Charles Snelling and *Lyon & Moinet*, for defendants.

CARPENTER, J. June 10, 1902, complainant commenced this suit in the court below, averring that on the 12th of February, 1902, he recovered a judgment in justice's court, in regular form, against defendant Samuel Elias Matteson, for $88.96 damages and $7.80 costs; that a transcript of said judgment was duly filed in the circuit court, and an execution issued and levy made on certain described land, which, on January 29, 1902, said Samuel Elias Matteson had fraudulently conveyed to defendant Cyrus Matteson, for the pretended consideration of $450; that the value of said land was upwards of $100; and prayed that the conveyance from said defendant Samuel Elias to defendant Cyrus be set aside, and complainant be permitted to sell said land to satisfy his judgment and costs. Defendants demurred, on the ground that the matter in dispute was not sufficient to confer jurisdiction. From an order overruling said demurrer, defendants appeal to this court.

The law by which this controversy is to be determined is contained in 1 Comp. Laws, § 435, and is as follows:

"Such courts shall dismiss every suit concerning property, excepting suits between copartners and suits for the enforcement of mechanics' liens, suits for the foreclosure of mechanics' liens, and suits for the foreclosure of mortgages, where the matter in dispute shall not exceed $100, with costs to the defendant."

It is insisted by complainant that the jurisdiction depends upon the value of the land. Defendants insist that it depends upon the value of the claim asserted by the complainant.

This court has decided that, where the complainant institutes a suit for the purpose of protecting his land from a lien asserted against it, the value of the land, and not the amount of the asserted claim, determines the jurisdic-

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tion of the court. *White* v. *Forbes*, Walk. Ch. 112; *Fuller* v. *City of Grand Rapids*, 40 Mich. 395; *Wight* v. *Roethlisberger*, 116 Mich. 241 (74 N. W. 474); *Mastenbrook* v. *Alger*, 110 Mich. 414 (68 N. W. 213); *Huyck* v. *Bailey*, 100 Mich. 223 (58 N. W. 1002); *Dodge* v. *Van Buren Circuit Judge*, 118 Mich. 189 (76 N. W. 315). On the other hand, it is equally well settled that, where the complainant is seeking to enforce a lien not within any exception to this statute, the amount of the claim asserted, and not the value of the land, determines the jurisdiction. *Dewey* v. *Duyer*, 39 Mich. 509; *Peake* v. *Bradley*, 121 Mich. 182 (79 N. W. 1108). In other words, the matter in dispute is determined by the claim asserted in the suit. If the complainant asserts that valuable property is in danger of being lost, the value of that property determines the jurisdiction. If the claim asserted is a lien against that property, and a suit is brought to collect that claim, its value determines the jurisdiction.

It results, therefore, that the order overruling the demurrer must be reversed, and complainant's bill dismissed, with costs of both courts.

The other Justices concurred.

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DETROIT FIRE & MARINE INSURANCE CO. *v.* HARTZ.

1. TAXATION—INSURANCE COMPANIES.
   1 Comp. Laws, § 3834, providing that, in computing the taxable property of an insurance company, the value of its real property shall be taken from its net assets above liabilities, and the remainder shall be the amount of personalty for which it shall be assessed, indicates an intention to tax the property of the company, and not a design to impose a franchise tax.

2. SAME—REINSURANCE RESERVE—EXEMPTIONS.
   The reinsurance reserve fund of an insurance company is not a

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debt in the ordinary acceptation of the term, nor is it such a *bona fide* indebtedness as would entitle a taxpayer to an exemption of an equal amount of credits under subdivision 5 of section 3832, 1 Comp. Laws.

3. SAME—PERSONALTY—UNITED STATES BONDS—MANDAMUS.

Where, in assessing the personal property of an insurance company, the assessors have determined its assets from the report of the insurance commissioner, as directed by statute, and there is included in the assets $120,389 of United States government bonds, and the liabilities include an item of $241,727.72 reinsurance reserve fund, *mandamus* will not lie to compel the assessors to deduct the amount of the bonds from the taxable personal property.

Certiorari to Wayne; Rohnert, Frazer, Carpenter, and Hosmer, JJ. (Brooke and Donovan, JJ., dissenting). Submitted October 7, 1902. (Calendar No. 19,444.) Decided March 30, 1903.

Mandamus by the Detroit Fire & Marine Insurance Company against John C. Hartz and others, composing the board of assessors of the city of Detroit, and the common council of said city, to compel the reduction of an assessment against relator. From an order denying the writ, relator brings *certiorari*. Affirmed.

Moore & Goff, for relator.

P. J. M. Hally (*Timothy E. Tarsney*, of counsel), for respondents.

HOOKER, C. J. The relator is an insurance company. The law under which it is taxed reads as follows:

"In computing the taxable property of insurance companies organized under the laws of this State, the value of the real property on which a company pays taxes shall be deducted from its net assets above liabilities, as determined and shown by the last report of the commissioner of insurance, and the remainder shall be the amount of personal property for which the company shall be assessed." 1 Comp. Laws, § 3834.

The report of the commissioner, upon which the assess-

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ment complained of was based, shows an excess of assets over liabilities of $1,076,643.09. Of the assets, $368,878.84 consisted of real estate, and $120,389 of United States bonds, while in the liabilities was an item of $241,727.72 for "amount required to reinsure outstanding risks."

Section 3834 clearly indicates an intention to tax the property of insurance companies, not a design to impose a franchise tax. It provides a way in which the value of their personal property may be ascertained by the assessor, and the validity of the rule was sustained in *Michigan Mut. Life-Ins. Co.* v. *Hartz*, 129 Mich. 104 (88 N. W. 405). In this case the assessors have followed the direction of the law.

It may be contended that the law has adopted this as the method most likely to result in getting at a fair valuation of the personal property of such a company, and that no inquiry can be made into the character of the personal estate whereby any portion of it can be deducted from the assessment. But if this is not so, and the assessors should have taken out the $120,389 representing the United States bonds, they were equally at fault in deducting as an indebtedness the item of $241,727.72. The grounds on which it is asserted that this is an indebtedness, to be deducted in accordance with the provisions of 1 Comp. Laws, § 3831, subd. 6, and 1 Comp. Laws, §§ 3832, 3842, are: *First*, that it is treated as a liability by the company and insurance commissioner, for the purposes of bookkeeping and a financial report, which is perhaps proper enough; and, *second*, for the reason that the policies of the company are subject to cancellation, and unearned premiums may in that event be demandable by the insured.

Neither one of these justifies such an assertion. The fund called the "reserve fund" is the property of the company. For the purpose of protection to patrons of the company, the law requires it to be kept in a fund called a "reinsurance reserve fund," so that the company may

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have the means to reinsure its risks if necessary, which it is given power to do; but its character is not changed on that account. See 2 Comp. Laws, § 5169. It is not a debt in any ordinary acceptation of the term, nor is it under the terms of section 3832. It cannot be called a "*bona fide* indebtedness owing by the taxpayer," such as is mentioned in subdivision 5 of said section. Again, it is true that upon cancellation of a policy the company must refund a part of the premium unearned. It has contracted so to do upon that contingency. The premium paid has become the property of the company, however, and we may take judicial notice that only a part of it will ever be paid back to the insured upon cancellation. It is a remotely contingent liability, but cannot be dignified by the name "*bona fide* indebtedness due or to become due," which is the term used in the statute to describe such exemptions. So that, in any view of this case, relator is not entitled to relief. The writ of *mandamus* is a discretionary writ. The court should not use it to compel the reduction of the assessment to the amount of the United State bonds, if it is true that more than that amount has already been deducted as credits.

The order of the circuit court is affirmed.

MOORE, GRANT, and MONTGOMERY, JJ., concurred.

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LYON *v.* CLARK.

1. CONSPIRACY TO DEFRAUD—EVIDENCE.
   A conspiracy to defraud creditors will not be inferred from slight evidence.

2. SALE—VENDOR'S LIEN.
   A vendor of land has a right to assert a lien upon the premises for the unpaid purchase price.

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3. SAME—BANKRUPTCY—PRIORITY.
A vendor's lien has priority over assignees in bankruptcy or a general assignee for the benefit of creditors.

4. SAME—WAIVER—NOTE FOR PURCHASE PRICE.
The receipt of a note for the purchase price of land does not constitute a waiver of a vendor's lien.

Appeal from Clinton; Stone, J. Submitted October 8, 1902. (Docket No. 16.) Decided March 30, 1903.

Bill by Willard C. Lyon, trustee in bankruptcy of the estate of Fred E. Hazle and Frank B. Clark, against Nathaniel J. Clark and Mary E. Clark, to set aside a deed. From a decree for complainant, defendants appeal. Reversed.

Almond G. Shepard and *Edwin H. Lyon*, for complainant.

High & Everett (*Norton & Dooling*, of counsel), for defendants.

MONTGOMERY, J. Some of the facts in this case were before the court in the case of *Lyon* v. *Clark*, 129 Mich. 381 (88 N. W. 1046). The present case is, however, a bill filed to set aside a transfer of other property, viz., a store building, made by Frank B. Clark, one of the bankrupts, to the defendant Nathaniel J. Clark, on September 5, 1898. Two grounds are alleged: *First*, that the transfer was fraudulent; and, *second*, that it constituted an unlawful preference in violation of the bankrupt act.

We are not able to discover any testimony in the record justifying the finding that there was any fraud in fact in the transfer of this property from the bankrupt to the defendant. That the transfer would, apart from the question of a vendor's lien, which is asserted by the defendant, have amounted to an unlawful preference, we think there is much testimony to show, and the finding

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of the circuit judge upon this point would be entirely justified. The question of importance, therefore, is whether the defendant had, as he asserts, a vendor's lien to the amount of the full value of the property transferred; for, if he had, nothing was withdrawn from the assets of the bankrupts, and the transfer could not have amounted to an unlawful preference.

Before considering the actual relations of the parties as between themselves, it may be well to refer to the claim, made by the complainant, that this property was deeded to the son with the express purpose of giving him a credit in order that he might buy goods on credit. This is asserted, and the statements of the defendant himself are relied upon by complainant to show this fact. We think no fair construction of his testimony justifies any such claim. On the contrary, on the page of the record referred to by complainant's counsel he distinctly denies any such purpose. The charge, in fact, is a charge of conspiracy entered into in advance for the purpose of defrauding creditors, and we think that the inference of such a conspiracy ought not to be drawn lightly, nor without a fair support of testimony, which we fail to discover in the record.

The case, then, must turn upon the question of whether, at the time of the conveyance to the son, the defendant Nathaniel J. Clark was entitled to, and continued to be entitled to, assert a vendor's lien. This conveyance was made on the 11th day of July, 1895, at which date the son, Frank B. Clark, executed a promissory note covering this land and an additional $1,500 which he owed his father for advances. As to the circumstances under which this conveyance was made, the testimony of the defendant is as follows:

"*Q.* What arrangement did you make with him [Frank], if any, about paying you for it [the store building in question]?

"*A.* Nothing, only took his note.

"*Q.* When was he to pay you for the building?

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"*A.* He was to pay me the note whenever I called on him to pay it. It was on demand. Whenever I saw fit or wanted that note, he was to pay it to me. That is the way it was.

"*Q.* What was there said between you about your having any lien on the property for your pay? Was there anything said about that?

"*A.* Nothing, only he was not to incumber the property any. I trusted that to him, that he must not incumber the property any; so that, if he did not pay the note, the understanding was I wanted him to deed back the property.

"*Q.* Why didn't you take back a mortgage for the amount of $3,000 on that property?

"*A.* Well, I trusted him to it as a son."

A vendor's lien has been frequently recognized in this State, and the rule which authorizes a vendor to assert a lien for the unpaid purchase price is clearly asserted in numerous cases (*Carroll* v. *Van Rensselaer*, Har. Ch. 225), the last case considered by this court being *Curtis* v. *Clarke*, 113 Mich. 458 (71 N. W. 845). The rule is also established by authority that a vendor's lien has priority over assignees in bankruptcy or insolvency, or a general assignee for the benefit of creditors. 1 Perry, Trusts, § 239. The only limitation on this rule is that, if the circumstances would indicate a purpose on the part of the vendor to waive his lien, it will not thereafter be enforced. We discover in this case no such evidence. The mere receipt of a note would not constitute a waiver of the lien. *Curtis* v. *Clarke*, *supra*. The testimony of the defendant does not show that there was any such purpose at the time the deed was made. It would appear from his testimony that it was distinctly agreed that the grantee was not to incumber the property, and it would appear that it was the grantor's understanding that, if the property was not paid for, he should deed it back. We think it should be held that the defendant had a vendor's lien upon this property, and as the lien was for the full purchase price, and which was as great as the value of the property at the time he reconveyed, the creditors of Frank B. Clark were

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in no way damnified by this transfer, and are in no position to complain.

The decree of the court below will be reversed, and the bill dismissed, with costs of both courts.

HOOKER, C. J., MOORE and GRANT, JJ., concurred.

BLACKBURN v. BLACKBURN.

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1. JOINT CONTRACTS—ACTION—NONJOINDER OF PARTIES.
   Where plaintiff and her husband, each owning individual interests in property, conveyed it to defendant upon an agreement that he should dispose of it and pay one-half of the proceeds to them, the contract was joint on the part of plaintiff and her husband, and, upon the latter's death, she could not bring suit for a part of the proceeds without joining with the representative of her husband's estate.

2. SAME—PLEA IN ABATEMENT—NOTICE.
   Nonjoinder of plaintiffs in an action on a joint contract need not be pleaded in abatement, or notice given under Cir. Ct. Rule 7.

Error to Alpena; Sharpe, J., presiding. Submitted October 16, 1902. (Docket No. 69.) Decided March 30, 1903.

Assumpsit by Cynthia A. Blackburn against William A. Blackburn for money had and received. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Reversed.

Joseph H. Cobb (*C. L. Collins*, of counsel), for appellant.

Charles R. Henry and *Robert J. Kelley*, for appellee.

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HOOKER, C. J. The trial court directed a verdict for the plaintiff in an action of *assumpsit*, and the defendant has appealed.

Defendant, William A. Blackburn, was the son of George N. Blackburn, deceased, and the stepson of the plaintiff. The plaintiff and her husband, George N. Blackburn, lived in Alpena, Mich., up to May, 1888, when they moved to Bryson City, N. C., taking considerable money with them, of which $700 belonged to the plaintiff. They built a hotel and drug store, which were opened in February, 1889, the title then being in George N. Blackburn. On May 20, 1889, he conveyed this property to his wife, the plaintiff, by warranty deed. In June, 1892, they wrote defendant, making him a proposition for him to go to North Carolina and take the property and contents, and sell and convert the same into money, and turn over one-half of the selling price to plaintiff and her husband. The personal property turned over belonged to plaintiff's husband, the realty to her, as we have said. The transfer was made, together with four policies of insurance, aggregating $5,000, which were assigned by the plaintiff, and one of $1,200, which was assigned by her husband. Defendant held possession of the property until November, 1892, when the hotel and much of its contents were destroyed by fire. After litigation, this defendant, William A. Blackburn, collected the insurance, which netted $5,542.95 after payment of $1,900 attorney's fees. All of this was received by him on January 16, 1896, and was derived from insurance on the hotel and furniture. Before this was received by defendant, and on October 9, 1895, George N. Blackburn died, and plaintiff was appointed administratrix at Alpena, where the deceased and she resided at the time of his death. The defendant refused to pay over any part of the money received as proceeds of the property, and plaintiff instituted two actions—this one in her own right, and another as administratrix—to recover the amount due them, claiming one-fourth in each action. Upon the trial it was conceded that the defendant had in his hands a total of

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$5,880.62, and the court directed a verdict for the plaintiff for one-fourth of that amount (which included the insurance money and a sum received by him on the sale of certain personal property), with interest, as her share.

It is apparent from the testimony that plaintiff and her husband conveyed this property and assigned the policies of insurance upon an agreement by defendant to dispose of the same, and pay them one-half of the proceeds. This appears from the written instruments themselves, especially in the light of the circumstances surrounding the transaction, and it is not a forced construction to hold that the policies were for mutual protection. The contract was joint on the part of the plaintiff and her husband, and not several, and the demand was single, and should not have been split.

It is said that the nonjoinder of the husband's representative should have been pleaded in abatement; and, again, that under Cir. Ct. Rule 7 it should have been specially pleaded that this was a joint contract. This is not an affirmative defense. It was incumbent on the plaintiff to prove a several contract, and, failing to do so, her action fails, because she does not prove a contract to pay to her one-fourth of the sum realized, but a promise to pay to herself and another one-half. *Monaghan* v. *Insurance Co.*, 53 Mich. 253 (18 N. W. 797); *Howe* v. *Hyde*, 88 Mich. 93 (50 N. W. 102); *Fowles* v. *Hayden*, 130 Mich. 47 (89 N. W. 571); 1 Chitty, Pl. 7.

We are constrained to reverse the judgment, and direct a new trial.

MOORE, GRANT, and MONTGOMERY, JJ., concurred.

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REID *v.* DETROIT IDEAL PAINT CO.

1. CORPORATIONS—SUBSCRIPTIONS TO INCREASED CAPITAL STOCK—VALIDITY.
   One who agrees to take a certain amount of the increased capital stock of a corporation on condition that a third person take a certain amount, after it has been issued to and accepted by him, is bound to pay for the same, especially where the amended articles are filed before suit is begun for the purchase price.

2. SAME—FILING OF ARTICLES.
   There should be valid and binding subscriptions to stock before articles of incorporation are filed.

3. SAME—LIABILITY ON SUBSCRIPTION—RATIFICATION.
   Where a person subscribes to the increased capital stock of a corporation, his liability to pay does not depend upon his ratification of the agreement after the amended articles are filed.

4. SAME—EVIDENCE—FINANCIAL CONDITION OF CORPORATION.
   On the trial of an issue whether a party subscribed to the increased capital stock of a corporation, testimony as to the subsequent embarrassed financial condition of the corporation is immaterial.

5. SAME.
   Testimony by the party, that he would not have kept the stock if he had understood that it was issued to him as testified by a certain witness, is incompetent.

6. SAME—VALUE OF STOCK—SECRET INTENTIONS.
   The liability of one who has subscribed to the increased capital stock of a corporation cannot depend on the value he placed on the stock, or his secret intentions in taking it.

Error to Wayne; Frazer, J. Submitted October 16, 1902. (Docket No. 74.) Decided March 30, 1903.

Assumpsit by William Reid against the Detroit Ideal Paint Company for goods sold and delivered, in which defendant sets off a claim based upon a subscription to its capital stock. From a judgment for plaintiff, defendant brings error. Reversed.

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Moore & Moore (*Henry B. Shaw*, of counsel), for appellant.

A. G. Pitts and *O. M. Leonard*, for appellee.

HOOKER, C. J. On January 1, 1896, a concern going under the name of the Detroit Ideal Paint Company was doing business in Detroit. It was conducted by one Fuller. It was held out to be a corporation with $12,000 capital, of which Fuller, his wife, and brother-in-law held all of the shares of stock. It was in the habit of filing annual reports, as required by law of corporations. We discover nothing in the record to indicate that it was not a corporation legally organized. Fuller appears to have had full charge and control of its affairs, the other stockholders having nominal interests. Reid, the plaintiff, was a creditor of this company for goods sold it, and he was an indorser of its paper given to him as payee for a large amount. The bookkeeper testified that the total claim exceeded $6,017 on January 1, 1896, as shown by the defendant's books. Of this $227.79 was an open account, and the remainder on notes outstanding. The defendant met with a loss by fire on March 8, 1900. The plaintiff thereupon sued the defendant, and garnished the insurance money. He recovered a judgment for $2,567.85, and the defendant has appealed.

Upon the trial the defendant claimed some $2,000 and upwards by way of set-off, basing it upon the following allegations of fact, viz.: That about January 1, 1896, the company was largely indebted to Reid, and that he was urging payment; that an arrangement was made to increase its capital stock $7,000, Reid agreeing to take $2,000 of the new stock, provided that one Dr. Olin would take the other $5,000; that this was carried out, a resolution adopted by the stockholders, and entered in the minutes kept of the proceedings of the company, increasing the stock to $19,000, and certificates of stock issued to plaintiff and Dr. Olin; and that plaintiff has never paid

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for the stock. The plaintiff denies that he ever participated in any arrangement whereby he agreed to purchase or pay for stock in the concern, although he does not deny the receipt of a certificate for stock to the amount of $2,000. The court left the question to the jury. The errors assigned relate to the introduction of proof and the charge.

We have no doubt that, if Reid agreed with the defendant company to take $2,000 of additional stock, to be applied on his claim, upon condition that the stock should be increased $7,000, of which increase Dr. Olin should take $5,000, it was a valid engagement, and if subsequently the resolution increasing the capital was duly passed by the stockholders, and the stock issued to Dr. Olin and the plaintiff, and accepted by him as a stockholder, and the concern went on doing business, he cannot now avoid his obligation, especially as the amended articles were filed before this action was begun. The law which requires the filing of articles contemplates that there will be valid and binding subscriptions of stock before filing. See *Anderson* v. *Railroad Co.*, 12 Ind. 376 (74 Am. Dec. 218); *St. Louis Colonization Ass'n* v. *Hennessy*, 11 Mo. App. 555; *Appleton Mut. Fire-Ins. Co.* v. *Jesser*, 5 Allen, 446; *Methodist Episcopal Union Church* v. *Pickett*, 19 N. Y. 482; *Tarbell* v. *Page*, 24 Ill. 46; *Chubb* v. *Upton*, 95 U. S. 665; *Pullman* v. *Upton*, 96 U. S. 328; *International Fair Ass'n* v. *Walker*, 83 Mich. 386, 88 Mich. 62, 97 Mich. 159 (47 N. W. 338, 49 N. W. 1086, 56 N. W. 344); *Detroit Driving Club* v. *Fitzgerald*, 109 Mich. 670 (67 N. W. 899). It was necessary to submit to the jury the question whether Reid agreed to take $2,000 of the additional stock, for while, upon the one hand, there was testimony that tended to prove it, there was also testimony that there was no such agreement.

It is claimed by defendant's counsel that the court instructed the jury that the subscription, sale, and delivery of the stock was void until the certificate of increase was filed with the Secretary of State, and that Reid would not

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be liable for the stock unless he knew that the certificate had been filed, and, knowing that, had thereafter agreed to take the stock. Such instructions, if given, were not accurate, as will be seen from the authorities cited, for it cannot be said that his liability depended on his knowledge of the filing and subsequent ratification of the agreement. The charge was not given exactly as claimed, but we think a necessary inference from it is that, unless the jury should find a filing of the articles and a subsequent ratification, the plaintiff cannot be held liable for the stock.

We think that the proof of an embarrassed financial condition of the corporation at a time subsequent to the alleged agreement was immaterial. It was incompetent for Mr. Reid to testify that he would not have kept the stock if he had understood that it was issued as Mr. Fuller had testified. This did not tend to strengthen his denial. It is probable that the defendant was not prejudiced by this evidence, but it is mentioned in view of a retrial.

Complaint is made of the following instructions:

"But Mr. Reid claims that he did not buy this stock at all, and, if he did not, and it has not been transferred to him,— as I stated to you, it must be in writing to make it a lawful transaction,— then this $2,000 would not be allowed, because they owe him, and he has got nothing in pay for it. If he took this stock simply as security, or never valued it as anything, or never intended to take it as stock, then he would not be chargeable with the amount as to the value of the stock."

It was correct to say that, if he took the stock simply as security, the defendant could not set off the value in this action; but his liability ought not to be allowed to turn on the value he placed on it, or upon his secret intentions as to taking it.

The judgment is reversed, and a new trial ordered.

MOORE, GRANT, and MONTGOMERY, JJ., concurred.

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HINCHMAN *v.* KNIGHT.

1. SLANDER—EVIDENCE—EXCEPTIONS—APPEAL.
   The defendant in an action for slander cannot complain because the judge limited certain evidence to mitigation of damages, where no exception was taken, and his counsel stated it was not offered in justification.

2. SAME—WORDS ACTIONABLE PER SE.
   Testimony in an action for slander, showing that plaintiff was in possession of certain goods, does not warrant an instruction that the words, "You broke in there and stole some goods, the other day, out of the house," are not actionable *per se*, where it does not appear that defendant and all the hearers knew the circumstances which rendered it impossible for plaintiff to steal them.

3. SAME—INSTRUCTIONS.
   Where the court, at the request of plaintiff, instructed the jury that, if they found that defendant used the language charged in the declaration, their verdict must be for plaintiff, and, at the request of defendant, instructed them that the words were not actionable unless intended to impute a crime, and that the action could not be maintained if they were accompanied by an explanation showing a crime was not committed, the jury must have understood that the instruction given at the request of plaintiff was qualified by those given at the request of defendant, and the question whether the language was actionable *per se* was left to the jury.

4. SAME—DAMAGES.
   Where, under the testimony in an action for slander, the words used were actionable *per se*, and the judgment was for $60, defendant was not injured by an instruction that, if the words were intended and understood to charge only a trespass, the jury should not award any damages that would be excessive.

Error to Berrien; Coolidge, J. Submitted October 19, 1902. (Docket No. 236.) Decided March 30, 1903.

Case by Burwell Hinchman against David Knight for

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slander. From a judgment for plaintiff, defendant brings error. Affirmed.

Lawrence C. Fyfe and *George W. Bridgman*, for appellant.

O'Hara & O'Hara, for appellee.

HOOKER, C. J. The defendant has appealed from a judgment of $60 in a slander case.

Defendant owned and had rented a building to Jones. In January, 1900, Jones was in Chicago; and on January 12, 1900, acting under her husband's direction, his wife locked the house, and delivered the key to the plaintiff, to whom Jones was indebted in the sum of $12, or thereabouts. About the same time plaintiff received the following letter:

"Mr. B. HINCHMAN.

"*Dear Sir:* I came over to Chicago to close deal with Standard Oil Company to work then in Michigan, and expected to go back the same day, but was disappointed, and am obliged to wait until Monday.

"I can get no money until deal is closed, or would remit in this letter.

"As you know, my wife has been sick for some two weeks past, and is deemed best by all that she come to mother's and place herself under our old physician's care. I am sending for her, and have instructed her to lock house and leave key with you personally. I do this as evidence of good faith, to be held on your part as security for the debt I owe you until I arrive at home and pay you. Rent is paid to February 1st, and I don't owe D. Knight one cent. I trust this arrangement will prove satisfactory to you, and I will be greatly obliged to you, and will certainly be back in Sawyer not later than Monday of next week, prepared to pay you.

"Yours truly,

"CHARLES H. JONES."

Jones' furniture was worth about $60. His wife having gone to Chicago, where her husband was, plaintiff became uneasy about his claim; and about February 10th he went to the house with McDonald, a constable, and Tatro, a

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teamster, with the intention of taking the furniture away, but concluded not to do so. A few days later, having given an assignment of his claim to one Snyder, the latter obtained an attachment; and on February 12th he, with the plaintiff and McDonald and McCarton, who had also assigned a claim to Snyder, went to the house for the purpose of attaching the property. The defendant was there, fixing the fence, and expostulated against their taking the goods; and he and the plaintiff got into a quarrel, in the course of which defendant is alleged to have said to the plaintiff, in the presence of the others: "God damn you! You broke in there and stole some goods, the other day, out of that house."

Counsel for the defendant claim to have offered testimony tending to show Hinchman's possession of the property, and that, while the court admitted it, he limited it to mitigation of damages, while it was competent by way of justification. No exception appears to have been taken to this when the court so limited it, and, furthermore, counsel for defendant expressly stated when the testimony was offered that they were not showing the previous transaction in justification.

It is clearly proved that Jones left his goods in his own home, which he placed in charge of Hinchman, to secure him for the amount that Jones owed him, by giving him the key to the house. It is claimed on behalf of the defendant that this gave Hinchman the possession of the goods, and that, being in possession of the goods, he would not have stolen them had he broken open the house and taken them away, and therefore the words of the defendant, if spoken as alleged, did not charge larceny. It is plain that the plaintiff did not steal the goods, for he did not take them; but, upon plaintiff's theory, it must be conceded that the defendant charged him not only with taking them, but stealing them. If it could be said that the proof showed that the circumstances alluded to were fully understood by the defendant and by all of the hearers of the charge, it is possible that the charge, as intended and understood, would

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not be a charge of crime, slanderous *per se*. But this cannot be said, because, so far as the record shows, neither the defendant himself, nor all of the hearers of the slanderous words, knew anything about the circumstances referred to. It is possible that McDonald did, and certainly the plaintiff did, but there is nothing tangible to indicate that Snyder or McCarton did; and the language alleged was a plain, unambiguous charge of larceny, which, under the rule of *Ellis* v. *Whitehead*, 95 Mich. 105 (54 N. W. 752), would justify, if not require, a charge that it was slanderous *per se*, in the absence of circumstances tending to show that it was used in a qualified sense. The testimony in the case did not warrant an instruction that these words were not actionable *per se*, and the court committed no error in refusing to so charge. If he left the question to the jury, this was as favorable treatment to the defendant as he had a right to expect.

It is claimed, however, that he did not leave the question to the jury. He opened the charge by reading to the jury several requests by the respective parties, as follows:

For the plaintiff:

"1. If the evidence in the case satisfies you that the defendant, at the time and place charged in the declaration, used the language charged in the declaration, your verdict must be for plaintiff."

For the defendant:

"1. The words claimed by the plaintiff to have been uttered are not actionable unless the defendant intended to impute the crime of larceny.

"2. The circumstances surrounding the speaking of the words may be given in evidence to rebut the presumption of malice, and to show the circumstances under which the words were uttered. The defendant has always been and is permitted, in a case like this, to show the matter affecting the meaning of the alleged defamatory language. An action cannot be maintained where the words, although imputing a crime, were accompanied by such an explanation as showed that the crime was not committed. Explanatory circumstances, known to all the parties,—speakers and hearers,—are to be taken into account, then,

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as part of the words. The test in such cases is the knowledge possessed by those to whom the language is published.

"3. If the language of the defendant, under the circumstances, did not charge the plaintiff with larceny, and if none of the hearers understood it as charging him with larceny, then the defendant is not guilty."

"5. If defendant's language used on the occasion complained of, taken as a whole, or all of it, did not, according to its fair meaning, under the circumstances, charge plaintiff with larceny, and if the hearers did not understand that it charged him with larceny, but that it simply charged him with doing some unfair or improper or dishonest thing, not amounting to larceny, as the hearers understood it, then defendant is not guilty."

It is urged that plaintiff's first request is diametrically opposed to the requests given for the defendant; and it is clearly inconsistent with them. But we think that the jury could not fail to understand that it was qualified by the requests given for the defendant, and we are of the opinion that the case should not be reversed upon that ground, even if defendant's counsel are right in their contention that the court could not properly charge that the words were actionable *per se*. Furthermore, the testimony in the case did not admit of an inference that the language, which was unequivocal, was intended and understood in a different sense than that naturally imported by the words.

Error is assigned upon the following portion of the charge, viz.:

"The defendant claims that he had good reason to believe, and did believe, that the plaintiff had entered the house of one Jones, and had unlawfully taken goods therefrom; that this was committing a trespass. His attorneys also claim that, whether he used the word 'stolen' or not, he intended only to charge the plaintiff with a trespass, and that the hearers so understood it at the time. Now, if this be so,—if the hearers understood that defendant was only charging an unlawful act, and not a theft, and he did not intend to charge theft,—then the offense in such case would only be trivial. In such case you could not award any damages that would be— That is, you must

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avoid rendering any verdict that would be excessive. It is for you to determine whether it is the fact. If the defendant had no good reason to believe, and did not believe, that plaintiff had entered the house of Jones and taken goods therefrom, the accusation would be reckless and malicious."

It is said that, if the words charged only a trespass, they were not actionable, in the absence of an allegation and showing of special damage, and that the judge erred in saying that in such a case the jury "should not award any damages that would be excessive." This point would be well taken but for the fact that, under the testimony, the court might have justly said that the words were actionable *per se*. *Youngs* v. *Adams*, 113 Mich. 200 (71 N. W. 585); *Ellis* v. *Whitehead*, 95 Mich. 105 (54 N. W. 752).

The judgment is affirmed.

MOORE, GRANT, and MONTGOMERY, JJ., concurred.

BAUER *v.* AMERICAN CAR & FOUNDRY CO.

1. MASTER AND SERVANT—PERSONAL INJURIES—ASSUMPTION OF RISK.

An employé was injured by the fall of an air hoist suspended from a horizontal track, kept in place by flanges on the wheel and the force of gravitation. By reason of the neglect of a fellow-workman properly to regulate the air pressure after using the hoist, the piston descended, and, striking something, lifted the hoist from the track, so that it fell upon plaintiff. *Held*, that, as the danger from the defective attachment—*i. e.*, that any force raising the hoist would tend to detach it, and permit it to fall—was apparent to any careful observation, it was assumed by plaintiff.

2. SAME—KNOWLEDGE OF DANGER.

By the terms of his employment, a servant agrees that dangers obviously incident to the discharge of his duty shall be at his

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risk, and it is unimportant whether he is informed or knows of the particular danger to be apprehended.

3. SAME—KNOWLEDGE OF FOREMAN—WARNING OF DANGER.
The fact that defendant's assistant foreman knew that a hoist fell, through the negligence of an employé, some days before plaintiff's injury, did not charge defendant with knowledge thereof, so as to require a warning to servants of the danger.

Error to Wayne; Hosmer, J. Submitted November 19, 1902. (Docket No. 10.) Decided March 30, 1903.

Case by John Bauer against the American Car & Foundry Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

Keena & Lightner (*Wells, Angell, Boynton & McMillan*, of counsel), for appellant.

Washington I. Robinson, for appellee.

CARPENTER, J. In the court below, plaintiff recovered a verdict and judgment for injuries resulting from the fall of an air hoist while he was in defendant's employ. This air hoist was an appliance used for lifting and moving heavy iron beams. It weighed about 500 pounds. The power by which it was operated was compressed air. It was suspended from a horizontal track, about 12 feet above the floor. It consisted of a cylinder and a piston moving therein. The length of this cylinder was five or six feet. By regulating the pressure of compressed air in said cylinder by means of a lever, the workman operating the same raised or lowered said piston. Suspended from said piston was a hook, which, by being attached to chains on said beams, raised or lowered them at the will of the workman operating the hoist. It follows from the above description that said piston, when at the bottom of said cylinder, almost touched the floor. To enable the beams handled by the air hoist to be carried from one part of the shop to another, said hoist, by being suspended from the overhead track in the manner hereinafter described, could be moved along

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and under said track. A single strap of iron connected the upper end of said hoist with a wheel. This wheel had a flange on each side, and ran along said overhead track. All that kept said hoist in place were the flanges on said wheel and the force of gravitation. Any force lifting the hoist up would tend to detach it from the overhead track. By attaching the hoist to the track in this manner, plaintiff contends that the defendant was negligent. Several of these air hoists, substantially alike, were in operation in defendant's shop, where plaintiff was employed.

The immediate circumstances connected with plaintiff's injury are these: A co-employé of plaintiff had used one of these air hoists to move an iron beam called a "channel." After he had said channel in the desired location, by regulating the air pressure with the lever at his hand he lowered the piston, and unfastened the channel. He neglected then either to move the hoist or, by using the lever, to change the pressure of the air, and, as a result, the descending piston struck the channel or some other object, and, because of its insecure fastening, the hoist was detached from the track above, and fell upon and seriously injured plaintiff, who was passing by.

Defendant insisted in the court below, and insists here, that the testimony of plaintiff shows that his injury resulted from a risk assumed by him, and that the negligence of a fellow-servant was the proximate cause of his injury. The view we take of the former contention makes it unnecessary to consider the second. Did plaintiff's injury result from an assumed risk? At the time of his injury plaintiff had worked for defendant five weeks. During this time he had been employed as a puncher; that is, with two assistants, he had been engaged in punching holes through beams which were moved by one of these air hoists. He had to use the hoist 15 or 16 times a day, and operated it himself. After he had worked there two weeks, he noticed that the wheel ran on a track, and that it only hung on one side of the track. He thought, however, that the air hoist was safe, and, if he

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had known that it was not, he would not have been working around it at all.

It is urged as a material circumstance that the evidence shows that, a short time before plaintiff's injury, one of the air hoists fell in the shop where he was working. This fall also was caused by the piston striking a pile of beams. No injury seems to have resulted, and the testimony does not indicate that any serious damage was done to property. The fact that this air hoist fell was generally known among the employés in that room. The assistant foreman in charge of the room knew it, though the plaintiff did not.

Said this court, in *Lamotte* v. *Boyce*, 105 Mich., at page 548 (63 N. W. 518):

"The duty of the employer to provide reasonably safe machinery is qualified by his right to contract for the use of machinery which falls short of the best and most approved; and when the defect is obvious, and cannot escape ordinarily careful observation, which is always due from the employé, the risks attendant upon such use are assumed by the latter."

In line with this case are the following decisions: *Fisher* v. *Railway Co.*, 77 Mich. 546 (43 N. W. 926); *Ragon* v. *Railway Co.*, 97 Mich., at page 274 (56 N. W. 612, 37 Am. St. Rep. 336); *Manning* v. *Railway Co.*, 105 Mich., at page 266 (63 N. W. 312); *Secord* v. *Railroad Co.*, 107 Mich. 540 (65 N. W. 550); *Phelps* v. *Railway Co.*, 122 Mich. 171 (81 N. W. 101, 84 N. W. 66); *Pahlan* v. *Railway Co.*, 122 Mich., at page 236 (81 N. W. 103).

But it is said that the doctrine does not apply where, as in this case, the injured employé was not informed and did not know of the danger to which he was exposed from the alleged defective appliance. This is not the test. In *Ragon* v. *Railway Co.*, 97 Mich. 265 (56 N. W. 612, 37 Am. St. Rep. 336), the principle was applied to a case where the employé did not even know of the defect. The doctrine of assumed risk rests upon the theory of a contract. Says Judge Taft in *Narramore* v. *Railway Co.*, 96 Fed., at page 301, 37 C. C. A., at page 501:

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" 'Assumption of risk' is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself, but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed, expressly or impliedly, to assume."

We must hold, therefore, that plaintiff has agreed to assume all dangers obviously incident to the defective method of attaching the hoist to the overhead track from which it was suspended. The question, then, is, not what dangers plaintiff actually apprehended, but what dangers were obviously incident to this defective method of attachment. The obvious danger was this: That any force raising the hoist would tend to detach it, and permit it to fall. It is impossible to conceive that plaintiff did not know this. Whether he actually did know it or not is of no consequence, because, being an obvious danger, he assumed it, under the law already stated. About the only force likely to raise these hoists and detach them from the overhead track—as shown on the two occasions when a hoist fell—was that resulting from the piston striking some object on the floor through the negligence of the workmen operating them. The danger, then, which plaintiff did not know, was that his co-employés might be negligent. Surely, no one will contend that he did not assume this danger, whether he apprehended it or not. His employment bound him to assume it. *Quincy Mining Co.* v. *Kitts*, 42 Mich., at page 39 (3 N. W. 240); *Hewitt* v. *Railroad Co.*, 67 Mich., at page 66 (34 N. W. 659).

Nor can it be contended that the fact that a hoist fell, through the negligence of his co-employés, before plaintiff was injured, charged defendant with the duty of informing plaintiff of this occurrence. It is true that this occur-

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rence was not known to the plaintiff, and that it was known to defendant's assistant foreman, in charge of the shop where he worked. The knowledge of this official would not, however, be imputed to defendant (see *Findlay* v. *Foundry Co.*, 108 Mich. 286 [66 N. W. 50]), and there was nothing in the circumstance of the fall itself to give the defendant knowledge.

We are bound to hold, therefore, under the law as declared by this court, that plaintiff's injuries resulted from a risk assumed by him, and therefore the judgment of the court below must be reversed, and a new trial ordered.

The other Justices concurred.

PEOPLE *v.* GOODRODE.

1. POLYGAMY—MARRIAGE—EVIDENCE—NONPREJUDICIAL ERROR.
   Where, on a trial for polygamy, respondent's testimony and that of his alleged first wife showed the performance of a marriage ceremony between them, followed by their living together as husband and wife, a valid marriage was shown, and hearsay testimony, introduced for the purpose of proving the marriage, was not prejudicial error.

2. CRIMINAL LAW—WITNESSES—DOCUMENTS—CONSTITUTION.
   The provision of the Constitution, securing to the defendant in a criminal prosecution the right to be confronted with the witnesses against him, does not permit the admission of a certificate of a county clerk that, after diligent search, he is unable to find any record of a marriage between certain persons, for the purpose of showing that the marriage did not take place.

3. POLYGAMY—INSTRUCTIONS—EVIDENCE.
   In a prosecution for polygamy, where there was no evidence that the alleged former marriage of respondent's first wife was a sham marriage, it was error for the court to charge that, if the parties "merely went through a sham ceremony, then it was no marriage and no defense."

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4. MARRIAGE—WITNESSES—CORRECTING CHARGE.
In a criminal prosecution the court instructed the jury that two witnesses were necessary to a valid marriage, and then that "it appears from the testimony that but one witness was present." *Held*, that a subsequent attempt to correct the charge by eliminating, "it appears from the testimony that but one witness was present," did not cure the error, as it still left the jury to believe that two witnesses were necessary to constitute a valid marriage.

5. EVIDENCE—ADMISSIBILITY AND WEIGHT.
It is the province of the court to determine what testimony is admissible, and of the jury to determine the weight to be given it.

Exceptions before judgment from Van Buren; Carr, J. Submitted November 21, 1902. (Docket No. 222.) Decided March 30, 1903.

Nelson R. Goodrode was convicted of polygamy. Reversed.

Hammond, Hammond & Donovan, for appellant.

Horace M. Oren, Attorney General, and *David Anderson*, Prosecuting Attorney, for the people.

MOORE, J. The information in this case charges the respondent with polygamy; that on the 24th day of March, 1892, and in the county of Fulton, State of Ohio, he married one Anna Carpenter; and on the 20th day of July, 1896, he married one Agnes Cleary, not having at that time obtained a divorce from Anna Carpenter. A trial was had, and the respondent was found guilty.

Error is assigned upon the admission of testimony introduced for the purpose of proving the marriage of March 24, 1892. The testimony of Mr. Bloomer, based upon what the judge of probate told him, was improperly admitted. It was hearsay. But, inasmuch as the testimony of the respondent and of Anna Carpenter showed the performance of a marriage ceremony between them on or about March 24, 1892, followed by their living together

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as husband and wife, we think a valid marriage was shown (see *People* v. *Lambert*, 5 Mich. 367 [72 Am. Dec. 49]; *People* v. *Calder*, 30 Mich. 85; *Hutchins* v. *Kimmell*, 31 Mich. 126 [18 Am. Rep. 164]; *People* v. *Girdler*, 65 Mich. 70 [31 N. W. 624]; *People* v. *Perriman*, 72 Mich. 184 [40 N. W. 425]; *People* v. *Imes*, 110 Mich. 250 [68 N. W. 157]), and the error was not prejudicial.

It was the claim of the respondent that when he married Agnes Cleary, in 1896, he supposed the woman he married in March, 1892, was dead, and that there was no legal impediment to his marriage, and did not learn there was until 1900, when he at once filed a bill for divorce from Anna Carpenter, and obtained a decree of divorce. It is also his claim that, when he married Anna Carpenter, she then had a lawful husband living.

The record discloses this woman had been married three or four times before the marriage ceremony in Ohio in 1892. Prior to 1886 she was reputed to have married one Van Lair. Upon the trial the people introduced as a witness Mr. Williams. He testified upon cross-examination that he married Angeline Carpenter in 1886 or 1887; that before then she had been married to one Fuller; that, supposing Fuller was dead, Mr. Williams married her; that he afterwards learned Fuller was alive; that he advanced the money, and Mrs. Fuller obtained a divorce from Fuller; that at this time she was keeping house for Mr. Williams as his housekeeper, but not as his wife, and continued to do so for two or three months after the divorce; that, as he did not deem his marriage with her was legal, he never got a divorce from her. He also testified that afterwards he understood she married one William Miller at Saginaw, and still later married respondent. Anna Carpenter was sworn as a witness on the part of the respondent, who testified that, before marrying Goodrode, she married Miller in Saginaw, in the presence of witnesses, by a man who was represented as a minister, and she and Miller lived together, and were not divorced when she married Goodrode.

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For the purpose of rebutting this testimony, the people were allowed, against the objection of the respondent, to introduce in evidence the following paper:

"STATE OF MICHIGAN, } ss.
County of Saginaw. }

"I, R. Crowfoot, county clerk and clerk of the circuit court, having a seal, do hereby certify that after diligent search of the records of marriages of said county, under my control, I am unable to find any record of a marriage between William Miller and Anna or Angeline Carpenter, Fuller, or Williams.

"Witness my hand and seal of the court of Saginaw, this 9th day of April, 1902.

[Signed] "R. CROWFOOT,
"County Clerk.

"[Seal of the circuit court of Saginaw county, Michigan.]"

As to this part of respondent's defense the court charged the jury, among other things:

"It is claimed by the respondent that this marriage to Anna Carpenter was void and illegal for the reason that she was at the time of said marriage the wife of one William Miller. I charge you that this claim is no defense to respondent, unless the evidence in the case shows this claimed marriage to William Miller to have been a legal one. If Anna Carpenter and William Miller merely went through a sham ceremony, then it was no marriage, and would be no defense. Under the laws of this State, in the solemnization of marriage no particular form is necessary, except that the parties shall solemnly declare, in the presence of the magistrate or minister and in the presence of the attending witnesses, that they take each other as husband and wife; and in every case there must be at least two witnesses besides the magistrate or minister present at the ceremony. If any ceremony was performed at all between William Miller and Anna Carpenter, it appears from the testimony that but one witness was present, and it further appears that this marriage was performed, if at all, in Saginaw, and it appears from the certificate of the county clerk of Saginaw county that no record of such a marriage is found in that county. You are at liberty to consider this as testimony to show that the marriage claimed to have been had between William Miller and

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Anna Carpenter was not a valid marriage, and, if it was not a valid marriage, then it is no defense to respondent.

"*Mr. Anderson:* Now, if your honor please, there is one place in there that should be changed, where it says, 'It appears from the testimony that but one witness was present.' I think it would be an error to leave that little statement in, and would like to have that changed.

"*The Court:* Well, that statement, on the prosecutor's statement, is eliminated from this request."

Again:

"I think I am safe in saying to you, if this Mrs. Carpenter and this man William Miller honestly contracted a marriage, and agreed to take each other as husband and wife, and lived together as such, and were known as such in the community, then that would be in the law a marriage. But that is for you to say, and in considering that point you will consider the evidence of the kind of ceremony. In passing upon that you will consider the fact that the name of the minister—that is, in weighing her testimony—is not repeated here, and the fact that there is no record of the marriage. All these things you may consider as bearing upon the question of good faith of that marriage."

The respondent insists that the certificate of the clerk of Saginaw county was not admissible, as the accused was entitled to be confronted with the witnesses against him. The people say the testimony was admissible; citing *People* v. *Jones*, 24 Mich. 215. A reference to that case will show it is easily distinguishable from this one. In that case the facts proven were essentially documentary, and of an affirmative character. In the opinion the court used the following language:

"We do not think the provision of the Constitution securing to the defendant in a criminal prosecution the right 'to be confronted with the witnesses against him' can apply to the proof of facts in their nature essentially and purely documentary, and which can only be proved by the original, or by a copy officially authenticated in some way, especially when the fact to be proved comes up collaterally, as in the present case."

In the case at bar the question to be decided was whether

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or not Anna Carpenter and William Miller had in fact been married, as she testified. The fact to be proven did not depend upon the existence of documents, but depended, in this case, upon whether or not a marriage ceremony was performed, as testified to by Anna Carpenter. This could best be shown by the persons who are said to have been present, as the contracting parties, the minister, or any one else who might have been present.

In *People* v. *Lambert*, 5 Mich. 349 (72 Am. Dec. 49), it was held that a certificate of marriage signed only by the minister or officiating officer, or the record thereof, cannot avail as evidence of the marriage in criminal proceedings, where the defendant is entitled to be confronted by the witnesses against him. Section 28, art. 6, of the Constitution, provides that the accused is entitled to be confronted with the witnesses against him. This is supplemented by the statute (3 Comp. Laws, § 11796), which provides that he shall have the right to meet the witnesses face to face who are produced against him. The people were allowed in this case to show that no return of the marriage of Anna Carpenter to William Miller had been made to the office of the county clerk, not by producing the clerk or some person having knowledge of the fact, who might be cross-examined as to how diligent a search he had made, but by the introduction of a certificate from him of the fact. This was contrary to the constitutional provision, as well as the statute. See *People* v. *Dow*, 64 Mich. 717 (31 N. W. 597, 8 Am. St. Rep. 873).

I do not think the certificate was admissible for another reason. There was positive testimony of the marriage ceremony, and that the parties were reputed to be husband and wife. It was sought to discredit this testimony in the manner indicated. We do not think it tends to do so, but the logical inference would be that the person whose duty it was to make the return had failed to make it. A conviction of so serious a crime as bigamy ought not to be predicated upon an inference of so doubtful a character.

There was no occasion for the trial judge to say to the

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jury, "If Anna Carpenter and William Miller merely went through a sham ceremony, then it was no marriage, and it would be no defense." It was the claim of the people that no marriage in fact was performed between these persons, while Anna Carpenter testified that the marriage ceremony was performed by a minister in the presence of witnesses. Her claim was either true or it was false. There is no testimony in the case that, if a marriage ceremony was performed, it was a sham ceremony, and the charge was calculated to prejudice the jury.

Again, when the judge undertook, at the suggestion of the prosecuting attorney, to correct his charge by saying, "Well, that statement, on the prosecutor's statement, is eliminated from this request," he did not correct the error in the charge. He had told the jury that, to constitute a valid marriage, there must be at least two witnesses besides the magistrate or minister present at the ceremony. He then instructed them, "It appears from the testimony that but one witness was present,"—in effect telling them no valid marriage was performed in Saginaw. While the jury may have understood that the court recalled what he had told them about the testimony showing there was but one witness present, it did not correct what he had charged them was necessary to constitute a valid marriage.

The charge of the court was calculated to impress the jury with the idea that Anna Carpenter's testimony was not entitled to much credence. It was for the judge to say what testimony was admissible, but it should have been left with the jury to say what weight should be given it.

The conviction should be set aside, and a new trial ordered.

HOOKER, C. J., and CARPENTER, J., concurred with MOORE, J. MONTGOMERY, J., concurred in the result. GRANT, J., took no part in the decision.

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PEOPLE v. GORSLINE.

1. BRIBERY—INFORMATION—SPARROW BOUNTIES.
   An information charging respondent with bribing a village clerk to issue false sparrow certificates under 2 Comp. Laws, §§ 5586–5589, was not defective in not containing the word "English" before the word "sparrow," where the information showed on its face that the sparrow certificates contemplated were such as could only be issued in compliance with the statute, and there was no chance for misapprehension.

2. SAME—EVIDENCE—PRIOR OFFENSES—INTENT.
   In a prosecution for bribing a village clerk to issue false sparrow certificates, testimony of prior similar transactions, coupled with evidence tending to show a conspiracy with another to continue them, was admissible for the purpose of characterizing and making clear the purpose of respondent in the payment of the money upon which the prosecution was based.

3. TRIAL—INSTRUCTIONS—FAILURE TO GIVE REQUESTS.
   Failure to give a request of respondent is not error where the subject is fully and fairly covered by the general charge.

4. SAME—ARGUMENTATIVE CHARGE—PRIOR OFFENSES.
   The charge in this case, which, on the whole, was eminently fair, was not erroneous for being argumentative, and in condemning the admitted misconduct of respondent, as the language complained of was used in an attempt to prevent the danger incident to testimony regarding prior offenses.

5. SAME—MISSTATEMENT OF EVIDENCE.
   A statement by the court in his charge that an important fact was admitted, when it appears from the evidence that respondent had denied it, is error.

Exceptions before judgment from Isabella; Dodds, J. Submitted November 21, 1902. (Docket No. 221.) Decided March 30, 1903.

Louis Gorsline was convicted of bribery. Reversed.

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T. W. Whitney, I. A. Fancher, and *H. A. Sanford*, for appellant.

Cyrus E. Russell, Prosecuting Attorney (*William A. Bahlke*, of counsel), for the people.

HOOKER, C. J. The defendant, Gorsline, was convicted of bribery, under an information which charged that he and one Gruber paid to one Struble, a village clerk, $25, "to influence and induce and cause him, said Jay Struble, village clerk as aforesaid, to issue to said person, viz., Louis Gorsline, fraudulent and false sparrow certificates provided by law to be issued by village clerks under and by virtue of Act No. 29 of the Session Laws of Michigan for the year A. D. 1887, and the amendments thereto, upon the lawful compliance with its provisions." It is contended that this information is fatally defective, because it did not contain the word "English" before the word "sparrow," inasmuch as the statute provided for the payment of bounties on English sparrows only. See 2 Comp. Laws, §§ 5586–5589.

The statute under which defendant was prosecuted is section 11311, 3 Comp. Laws, and is as follows:

"Every person who shall corruptly give, offer, or promise to any executive, legislative, or judicial officer, after his election or appointment, and either before or after he shall have been qualified or shall have taken his seat, any gift or gratuity whatever, with intent to influence his act, vote, opinion, decision, or judgment on any matter, question, cause, or proceeding which may be then pending, or may by law come or be brought, before him in his official capacity, shall be punished by imprisonment in the State prison not more than five years, or by fine not exceeding three thousand dollars and imprisonment in the county jail not more than one year."

The information shows upon its face that the sparrow certificates contemplated by the parties were such as could be issued by lawful compliance with the statute heretofore mentioned, and it could refer to nothing but English sparrows. There was no possibility of a misapprehension of

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its meaning, and we think the learned judge did not err in holding it a good information.

In opening the case to the jury, the prosecutor stated that he would show that, previous to the spring of 1899, Gruber was deputy clerk, and that he and Gorsline were engaged in similar transactions to the one charged; that, knowing that his superior was not to be re-elected, Gruber induced Struble to run for clerk, and introduced Gorsline to him as a sparrow hunter, with whom he would subsequently do business if elected; that, after Struble's election, Gorsline and Gruber at once began to pay him money and receive fraudulent certificates for sparrow bounties, which they collected. These statements were objected to. The theory of the prosecution was that this testimony tended to show a conspiracy, which characterized and made clear the motive and purpose of defendant in the payment of the $25 in December, upon which this prosecution rests. We are of the opinion that it was within the rule of the case of *People* v. *Seaman*, 107 Mich. 362 (65 N. W. 203, 61 Am. St. Rep. 326). The testimony shows that the money in question was furnished by the county clerk, who had become suspicious of Struble, with a view to the detection of his unlawful practices, and the defendant claimed it was for this purpose only that the defendant paid the money. On the other hand, the prosecutor claimed that the payment was made by the defendant for the purpose of securing evidence which he could use to prevent Struble from divulging his (defendant's) nefarious conduct on former occasions.

Counsel for the defendant submitted the following request:

"That if they find that the respondent, at the request of Rowlader, and for the purpose of ascertaining that Jay Struble was issuing false sparrow orders, and for the purpose of confronting him with it and thus stopping the crime, went to Struble and procured the four December orders, and paid him $20 for the same, and did not intend to use them to obtain money upon, they must acquit."

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This was not given, but it is claimed to have been fairly and fully covered by the charge, and we think this is true. The court said:

"Now, it makes no difference whether Struble issued any orders or not after the payment of it. The crime was completed, if it was a crime at all, at the time the money was offered by the respondent. Now, the respondent admits that he did pay money at that time to Struble, as I said before, and claims that he paid it at Shepherd. It makes no difference whether he paid it at Shepherd or sent it through a letter, as far as the substance of the offense is concerned, and it is for you to consider whether or not the people's claim as to how it was paid is correct, and whether that date is correct.

"As a general proposition to direct you in this, I will say that the respondent cannot be convicted unless you find beyond a reasonable doubt that, at the time claimed by the people, the money was given to Struble, by or through the agency of the respondent, with the corrupt intention and for the purpose of corrupting him and influencing his official action in issuing fraudulent certificates mentioned in the information. As I said to you before, that must have been the purpose, and whether or not Struble ever issued them would make no difference, if he received the money. If he had then said, 'I won't issue any certificates,' the crime would be just as complete as it would be if he had issued them, if it was paid to him with the corrupt intention of influencing him in his official action.

"It may have occurred to you that this respondent was committing a wrong from the beginning in paying money to Struble. That is true. He had no right in the world to pay the first $20 to him to pay him for counting sparrows, because the law itself obliged Struble to count all sparrows that were brought to him that were caught in the village of Shepherd, under the statute. It was entirely wrong from the beginning for him to pay any money. It is demoralizing to the officer, and to the respondent himself, and all the people, that the people shall be placed in position of having its officers receive money from individuals with whom they are doing business for the purpose of paying them for doing things that the statute obliges them to do without pay; but, however wrong that may be,

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it is introduced here simply for the purpose of showing the relation existing between the respondent, Struble, and Gruber, and as having a bearing upon the intention with which the act of December was done.

"Now, don't forget that it will be a great wrong to the respondent, and a great wrong to the people, if you should say that this man should be convicted by reason of having paid money in May or June to this officer. However wrong that may have been, this case is not planted upon that occurrence, but you should consider it as bearing upon the occurrence in December.

"It is for you to say whether or not the respondent paid the money in December for a corrupt purpose; and if for a corrupt purpose, then he is guilty. If it was not for a corrupt purpose, then he is not guilty, if it was paid to him with no intention of influencing his official action as an officer. The respondent claims that, while he paid the money to Struble to get him to issue orders, that the intention was to detect crime that it was claimed that Struble was committing with other persons. The claim of the people is that he did it for the sole purpose of protecting himself and getting Struble in his power. Now, if you find that he did it for a corrupt purpose of protecting himself, or for the corrupt purpose of getting the orders for any other purpose except to detect crime of other people, and without reference to himself, then he should be convicted under his own testimony, because he admits that he paid the money; but, if you find that it was not paid with the corrupt intention of doing wrong, then he must be acquitted.

"As bearing upon that, whether he paid that rightfully or with the intention of doing right, and without intention of doing a wrong, you must take into consideration all the testimony in this case. It is for you to determine whether or not the statement he makes of what happened between him and Rowlader is true, or whether the statement of Rowlader is true; that is for you to determine.

"You are to consider the way these sparrows were brought to Struble, the *memoranda* that were left with Struble, if you find that there were *memoranda* left, and the respondent himself admits some of them. It is stated here, and admitted by the defendant, that he used to leave *memoranda* with certain figures of the amounts that he placed in there, and asked orders to be drawn for more

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than the amount of birds delivered; that he intended afterwards to furnish the birds to make up the amount of the orders. Now, that was absolutely wrong and demoralizing. No man ought to have thought it was right at any time.

"The law is plain, and it seems to me that no one could make a mistake concerning the fact that the sparrows must be counted, must be there, and must be destroyed before the orders are drawn. But that is not what they complain of in this case. I call your attention to that, so that you won't get mixed when you go to your jury room. You may consider that as bearing upon whether or not the transaction of December was corrupt or not."

Several points are made against this charge. It is said to be argumentative, that it did not recognize defendant's theory, and that it unnecessarily condemned the admitted conduct of the parties, thereby causing a prejudice against the defendant. The learned circuit judge recognized the possible danger that the testimony regarding other transactions than that of December, 1899, might be misapplied by the jury, and he seems to have attempted to prevent it. It is in that connection that he used much of the language complained of. As a whole, the charge was an eminently fair one. He carefully limited the offense to the December transaction, and left controverted questions of fact to the jury. In this, as in most cases, there were some admitted facts, and the judge was justified in treating them as such in his charge, and referring to them in elucidation of the points involved in the case.

It is alleged that defendant was prejudiced by the last two paragraphs of the charge as quoted above, wherein it is implied that the defendant admitted that he left *memoranda* for certificates which he expected would be issued, although not accompanied by the requisite number of birds to justify it. This was important evidence on the subject of the conspiracy, if true, and the judge said that it was. Defendant's counsel say that this fact was not admitted, and that the question was an open one for the jury. The defendant stated in his testimony that he never received orders in excess of the birds delivered until the

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December transaction, and, although there was much evidence to the contrary, that made it a controverted question. The judge appears to have inadvertently overlooked this, and to have been mistaken in the statement. It was important as bearing upon the question of intent, and, as counsel claim, it was for the jury. We therefore have no alternative but to reverse the conviction. A new trial is ordered.

MOORE, CARPENTER, and MONTGOMERY, JJ., concurred. GRANT, J., took no part in the decision.

DETROIT ELECTRIC LIGHT & POWER CO. *v.* APPLEBAUM.

1. EVIDENCE—ADMISSIONS AND EXPLANATIONS.
   A party relying upon the admissions of the opposite party to prove a material fact is not concluded by the explanations and statements made at the same time as the admissions.

2. INSTRUCTIONS—HONEST OR DISHONEST TRANSACTIONS.
   A charge that, where a transaction admits of "either" an honest or a dishonest construction, it is the duty of the jury to accept the former, is erroneous.

3. RECEIVERS—RIGHT TO SUE.
   A receiver who has not rendered his final account or been discharged, whose bond is in force, and who has been authorized by the court to do so, may sue to recover assets of the estate, though previous to the suit the estate had been sold to him in a trust capacity.

Error to Wayne; Rohnert, J. Submitted December 2, 1902. (Docket No. 129.) Decided March 30, 1903.

Trover by the Detroit Electric Light & Power Company, Hoyt Post, receiver, against Isaac Applebaum and Alexander C. Cohen, copartners as I. Applebaum & Co. From a judgment for defendants, plaintiff brings error. Reversed.

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Wilkinson, Post & Oxtoby and *Walter E. Oxtoby*, for appellant.

Adolph Sloman, for appellee Applebaum.

Alex. J. Groesbeck, for appellee Cohen.

MOORE, J. This is an action brought by the Detroit Electric Light & Power Company, under the receivership of Hoyt Post, against the defendants, for the value of 7,728 pounds of copper wire alleged to have been stolen from plaintiff by certain of its employés, and by them sold to the defendants. The defendants obtained judgment. The case is brought here by writ of error.

The record shows the plaintiff company became embarrassed, and Mr. Williams was appointed receiver in May, 1899. The transactions out of which this suit springs occurred in April and May, 1900. At this time Mr. Williams was receiver, Daniel A. Casey was manager, and Robert A. Tress was line foreman of the company. The defendants were copartners in business under the firm name of I. Applebaum & Co. Isaac Applebaum carried on individually a separate scrap-iron business. The offices and yards of the two concerns were together, and adjoined the Detroit Electric Light & Power Company. One of their yards was on Woodbridge street, adjoining the power plant of the company, and their office and other yard was on Randolph street, separated from the power plant by a building occupied by a foundry. In April and May defendants purchased from Tress 7,728 pounds of old copper wire, for which this suit is brought. It was the claim of plaintiff that Tress and Casey were acting in collusion; that the wire belonged to the plaintiff, and was sold by Tress, individually and without authority, to the defendants; that having bought from Tress individually, who had no title, the defendants received no title, and were liable in trover. The defendants' theory was that they bought in good faith from the Detroit Electric Light & Power Company, through Casey,

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as manager, and Tress, as line foreman; that, knowing of no secret limitations on their apparent authority, they had a right to rely in good faith upon such apparent authority; that, having done so, they did not become liable, even if in fact Tress and Casey exceeded their authority in selling, and embezzled the proceeds of such sales. The record contained testimony tending to support both theories.

The first error demanding attention is the refusal of the court to submit to the jury plaintiff's theory of the case, to wit, sales by Tress of wire as his own property, without reference to plaintiff's ownership, on the ground that, the plaintiff's ownership of the property being shown by defendants' admissions, plaintiff must take all of such admissions or none. The court refused to submit to the jury the question whether the defendants bought the wire from Tress as his own property, and without reference to the ownership of the plaintiff company, in which case they acquired no title to it; Tress having none himself. The court did this on the ground that, as plaintiff proved the receipt of its property by defendants from their own admissions, plaintiff must take both the admissions and the explanation, and could not take the admission and contradict and do away with the explanation.

There was testimony tending to sustain plaintiff's contention that defendants actually knew that the wire belonged to the plaintiff, and yet undertook to buy it of Robert A. Tress individually, and that as an afterthought they took the ground that they bought from the plaintiff, —such as the statements made by the defendants in police court, and the entries of the transaction which appeared upon the books of defendants, at least some of which were changed. The plaintiff could avail itself of the admissions made by the defendants that the property bought of Tress was its property without being bound to accept all of the defendants' statements as to what they supposed about the ownership of the property. The jury might believe that part of the admission which charged the defendants, and disbelieve that part which made a defense,

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if the latter was improbable and discredited by the other testimony. See *Liesemer* v. *Burg*, 106 Mich. 124 (63 N. W. 999); *Parret* v. *Craig*, 56 N. J. Eq. 280 (38 Atl. 305); *Craig* v. *Parret*, 56 N. J. Eq. 848 (42 Atl. 1117); *Delamater* v. *Pierce*, 3 Denio, 315; *Roberts* v. *Gee*, 15 Barb. 449. In *Schmidt* v. *Pfau*, 114 Ill. 494 (2 N. E. 522), the court says:

"The answer of appellant to this is to the effect that, if his testimony is looked to for the purpose of proving any particular fact, it must be accepted as a whole, and for all purposes. This view of the law is clearly unsound, and finds no support from English or American authority. It is a familiar principle of the law of evidence as it obtains in this country and in England that the statements of a party, made against his own interest, may be accepted and acted upon by the jury as true, while others made in his favor, though at the same time and as part of the same conversation, may be rejected as unworthy of belief. In such case all that the witness has said relating to the particular matter in question goes to the jury for their consideration, but, when considered, they may believe such parts of the statement as seem reasonable and probable, and reject the balance. 2 Best, Ev. § 520."

Complaint is made of the following part of the charge:

"The law presumes that parties, in their dealings, intend to conduct them honestly; and, where a transaction which is challenged will admit either of an honest or a dishonest construction, it is the duty of the jury to accept the former,—that is, to accept the honest construction."

Counsel for appellees suggest that a typographical error crept in, and the word "either" was used when it was intended to use the word "equally." If the word "equally" had been used, the charge would not have been objectionable; but unfortunately it was not used, and by the charge a burden was put upon the plaintiff which does not exist even in cases of fraud. See *Watkins* v. *Wallace*, 19 Mich. 57; *Sweeney* v. *Devens*, 72 Mich. 301 (40 N. W. 454); *Kipp* v. *Lamoreaux*, 81 Mich. 299 (45 N. W. 1002); *Morley* v. *Insurance Co.*,

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85 Mich. 210 (48 N. W. 502); *Knop* v. *Insurance Co.*, 107 Mich. 323 (65 N. W. 228).

The other assignments of error which have been urged have been considered, but, as the questions involved are not likely to arise again, we do not deem it necessary to say any more about them.

On the part of the appellees it is claimed that as the property, including choses in action, of the Detroit Electric Light & Power Company, had been sold, before this suit was brought, by virtue of a decree entered in the foreclosure case, to Hoyt Post, trustee, and a deed made to him by the special master commissioner, Hoyt Post, as receiver, cannot maintain this action, and the verdict and judgment ought to stand. The sale was made to Hoyt Post, as trustee, June 29, 1900, and the master's report of the sale was filed June 30th. August 1, 1900, Mr. Williams resigned as receiver, and on the same day the court accepted his resignation, and appointed Hoyt Post receiver, and authorized said receiver to institute and prosecute all such suits as, in his judgment, were necessary. The deed from the special master to Hoyt Post, trustee, was made September 18, 1900. The record also shows that on the petition of Hoyt Post, receiver, the court having charge of the foreclosure proceeding made an order October 6, 1900, authorizing suit to be brought against Isaac Applebaum and Alexander C. Cohen, under the name and title of "Detroit Electric Light & Power Company, Hoyt Post, Receiver," for the recovery of the value of the copper wire received by them from employés of Nathan G. Williams, receiver. The record further shows he is still receiver, that he has not been discharged or rendered his account, and that his bond as such receiver is in full force. With the record in this condition, we have no doubt of his right to prosecute this suit.

Judgment is reversed, and new trial ordered.

The other Justices concurred.

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EMERY *v.* KALAMAZOO & HASTINGS CONSTRUCTION CO.[1]

1. PARTNERSHIP ASSOCIATIONS—VOLUNTARY DISSOLUTION.
   Two months before the end of the term of a partnership association, on a notice to members of a meeting for the consideration of a final settlement of the partnership affairs and the distribution of its assets, a resolution was passed to exchange its assets for stock in a railroad corporation, and divide it among its members. *Held*, that this was a voluntary winding up of the affairs of the partnership association, and did not comply with the provisions of the statute (2 Comp. Laws, § 6087).

2. SAME.
   A majority of the stockholders of a limited partnership association have no power to wind up its affairs by exchanging its property for stock in a corporation, and compelling a non-assenting shareholder to become a member of the corporation, and accept stock for his holding.

3. SAME—ESTOPPEL.
   A member of a partnership association, by receiving payment from a corporation of a partnership note which the corporation has assumed, is not estopped from objecting to the exchange of the partnership property for stock of the corporation, made for the purpose of winding up its affairs.

4. SAME—RAILROADS—OWNERSHIP OF STOCK.
   The fact that all of the stock of a railway company is owned by a partnership association does not prevent a member of the partnership from objecting to the surrender of the railway company's note for additional stock in the railway company in settlement of the partnership affairs, on the theory that the debt of the railway is really the debt of the partnership.

Appeal from Kalamazoo; Adams, J. Submitted January 8, 1903. (Docket No. 17.) Decided March 30, 1903.

Bill by Elma Cahill-Emery, individually and as guardian of Lee H. Cahill and Margaret Cahill, heirs at law of Leroy Cahill, deceased, against the Kalamazoo & Hast-

[1] Rehearing denied June 1, 1903.

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ings Construction Company, Limited, William S. Dewing, James H. Dewing, and Charles A. Dewing, copartners as Dewing & Sons, Martha A. Watson, executrix of the estate of Amasa B. Watson, deceased, Annie F. Cobb, executrix of the estate of Thomas S. Cobb, deceased, Edward Woodbury, Henry F. Badger, G. Edwin Dunbar, Charles S. Burton, Frank A. Bush and Benjamin A. Bush, administrators of the estate of Frederick Bush, deceased, F. A. Bush and B. A. Bush, administrators, and Thomas Paterson, doing business as Bush & Paterson, and the Chicago, Kalamazoo & Saginaw Railway Company, to rescind certain action of the managers of the Kalamazoo & Hastings Construction Company, Limited, and to wind up its affairs. From a decree dismissing the bill, complainant appeals. Reversed.

Charles S. McDonald and *George B. Fowler* (*Edward Cahill*, of counsel), for complainant.

Howard & Howard and *Carroll, Turner & Kirwin*, for defendants.

MONTGOMERY, J. This is a suit in equity brought by Elma L. Cahill (now Elma Cahill-Emery), in behalf of herself, as widow, and as guardian of her two children, Lee H. Cahill and Margaret Cahill, minors, heirs at law of Leroy Cahill, formerly of Kalamazoo, now deceased. The action is a stockholders' bill to rescind certain actions on the part of the managers of said construction company, to compel a restoration of the assets of the construction company, and to provide for the proper distribution of such assets among the members, and for the protection of its stockholders.

The Chicago, Kalamazoo & Saginaw Railway Company was organized January 17, 1883, and articles of association were amended December 10, 1887, when the authorized capital stock of the company was made $2,000,000. Of the $2,000,000 of authorized capital stock, only 715 shares were subscribed for, and only $5 per share—$3,575

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in the aggregate — was ever paid in. No progress was made in building the road until 1886, when the various individual subscriptions to the stock of the railway company were bought up by F. A. Bush and W. L. Eaton, as trustees; at least, so much of the stock as was not subscribed for by the individuals who afterwards formed the Kalamazoo & Hastings Construction Company, Limited. Eaton was afterwards succeeded by W. S. Dewing as trustee, and thereafter this stock was held by W. S. Dewing and F. A. Bush, both of whom are defendants in this case.

The Kalamazoo & Hastings Construction Company, Limited, was organized September 21, 1886, as a partnership association, limited, under chapter 160, 2 Comp. Laws, which act is specially referred to in the articles of association. The members were partly made up from former subscribers to the railway company stock, and partly from other individuals. The capital stock was fixed at $200,000, which was paid in in cash. The intended business of the construction company was to build a railroad for the Chicago, Kalamazoo & Saginaw Railway Company, and this purpose was expressly stated in the articles. The road contemplated was to extend from Kalamazoo to Hastings, in Barry county. Leroy Cahill was a subscriber to the capital stock of the construction company in the amount of $12,500, which amount he paid in in cash. Mr. Cahill never owned any stock in the railway company. Leroy Cahill died October 8, 1898, and his widow and minor children succeeded to his interest in the construction company, and are the complainants in this case. This fact is admitted in the pleadings.

In pursuance of the purpose of the construction company, a contract was entered into between the construction company and the railway company, by the terms of which the construction company was to build a railroad from Kalamazoo to Hastings. The contract price for the construction of the road was to be $15,000 per mile in 5 per cent. bonds, and $7,500 per mile in capital stock of the

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railway company. Several modifications of the contract were made from time to time. April 24, 1889, it was decided to extend the road from Hastings to Woodbury on the same terms and conditions as the previous contracts called for. November 21, 1893, the contract was changed in regard to compensation and contract price, and by this change the construction company was to receive $15,000 per mile in 5 per cent. 50-year gold bonds, and $9,500 per mile in stock; the same to be in full for all demands for construction and equipment. The road was completed, and trains running from Kalamazoo to Woodbury, September 1, 1889. The entire length of the road up to November 1, 1895, was 44.21 miles. The cost of the road to the construction company up to November 21, 1895, was $532,545.86 in cash. This amount was derived by the construction company from the following sources: Capital stock paid in in cash, $199,575; borrowed on construction company coupon notes, $179,750; bonuses from towns, $69,507.31; assessment on stockholders of construction company, afterwards returned, $7,847.55; railway company notes, $20,650; earnings returned to road in new construction from September, 1889, to November 1, 1895, $55,216,—a total of $532,545.86.

After the completion of the road, it was found impossible to sell the bonds, and the road was operated by and for the account of the construction company. Under the contract as it existed, no compensation was ever received by the construction company up to November 21, 1895, nor were any of the bonds or stock of the railroad turned over to the construction company, nor was any settlement ever made on that contract. On November 21, 1895, a new arrangement was entered into between the construction company and the railway company. By the terms of this agreement the construction company was to deliver to the railway company the road as then constructed between Kalamazoo and Woodbury, together with all equipment belonging thereto. The railway company was to assume all the outstanding indebtedness of the construction com-

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pany to the amount of $225,000, which included the coupon notes; the actual amount then outstanding being about $216,000. It was to give to the construction company a purchase-money note for $292,925, payable five years from date, with interest, and, in addition, to turn over to the construction company 3,785 shares of the capital stock of the railway company. This agreement was carried out, and the note was executed by the president and secretary of the railway company, dated January 1, 1896, and delivered to the construction company. This action on the part of the officers of the company was ratified by the railway company July 14, 1896. A certificate of 3,785 shares of stock in the railway company was also delivered to the construction company. In addition to the 3,785 shares of stock of the railway company issued to the construction company under this agreement for the purchase of the road, there were outstanding 715 shares of stock of the railway company, held in part by individual members of the construction company, and in part by Bush and Dewing, trustees, upon which 5 per cent. only had been paid in. This stock was now acquired by the construction company, and, in order to make these shares fully paid, the construction company gave its promissory note to the railway company for $67,925, or 95 per cent. of the par value of the 715 shares. This note was intended to be an offset to the purchase-money note of $292,925, thus leaving a net indebtedness to the construction company on said purchase-money note of the sum of $225,000, which is hereinafter referred to as the net note of $225,000. The transfer of the road to the railway company was effected January 1, 1896.

Prof. M. E. Cooley testified that in the fall of 1900 he made an appraisal of the physical properties of the railroad as then existing, and found the value to be $504,890. This did not include franchises. This appraisal, in connection with the report to the railroad commissioner December 31, 1900, shows that the common stock of the road had no value. There had been paid in $3,575 on 715

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shares,—just the amount required by law. It represented the control of the road. As carrying with it the control of the railway, it had some value,—a few dollars per share if any one wanted to buy the road. So far as the construction company was concerned, the common stock received by it cost the construction company practically nothing. It represented no money paid in, and was virtually valuable only for the control of the road. Such value as it had represented profits of the construction company on the contract.

September 21, 1895, the duration of the Kalamazoo & Hastings Construction Company was extended for five years, expiring September 21, 1901. No material change occurred in the management of either company from January 1, 1896, until the fall of 1900. The board of directors of the railway company and the board of managers of the construction company during this time was composed substantially of the same persons, most of whom are defendants in this action.

Some time in March, 1900, and previous to October 11, 1900, the interest of the Bowne estate and Henderson's interest in the construction company was bought up by Dewing & Sons, Badger, and Woodbury; amounting in all to some $60,000. Dewing & Sons, Badger, and Woodbury then held $101,875 interest in the construction company, which was a controlling interest. Later, on January 14, 1901, Dewing & Sons also purchased the interest of O. M. Allen, amounting to $5,000 of the capital stock of the construction company. Up to October 11, 1900, the note of $292,925 was carried as a liability in the reports of the railway company, and was so reported on oath to the railroad commissioner, and on the *memoranda* which Mr. Potter testified were the only balance sheets which the company had, and from which he made up his annual reports to the railroad commissioner.

On October 11, 1900, and after Dewing & Sons, Badger, and Woodbury had secured a majority interest in the construction company, measures were taken to transform the

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past-due coupon notes of the construction company into preferred stock of the railway company, and also to provide money for the extension of the road to Pavilion, some 11 miles south of Kalamazoo. A large part of the net earnings of the road had already been invested in a right of way, etc., for such extension. In furtherance of this plan, the construction company, at a meeting held October 11, 1900, at which meeting the defendants held a majority, voted to surrender the note for $292,925, and also 2,500 of the 4,500 shares of common stock of the railway company held by the construction company, provided the railway company would issue sufficient preferred stock to pay off the obligations of the railway company then outstanding, and extend the road, and also deliver back to the construction company its note for $67,925. There was a provision, also, that the stockholders of the construction company should have the right to subscribe to such issue of preferred stock *pro rata* to their holdings in the construction company. This was put in the form of a proposition emanating from the construction company to the railway company.

On November 15, 1900, at a meeting of the directors of the Chicago, Kalamazoo & Saginaw Railway Company, it was voted to accept the surrender of the note for $292,925 and 2,500 shares of common stock of the railway company, and to deliver up to the construction company its note for $67,925. It was also voted that the railway company issue $450,000 of 6 per cent. cumulative preferred stock for the payment of existing indebtedness and extensions of its line. This preferred stock could be called in and redeemed at par, with accrued dividends, on six months' notice. In case of the sale of the road or the bonding of the road, the first proceeds were to be applied to the payment of this preferred stock, before anything should be paid on the common stock. It was further provided that the preferred stock should not be sold for less than par and one share of common stock with each share of preferred; that it should be allotted to the members of

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the construction company *pro rata* according to their holdings in the construction company, and, any member declining or failing to subscribe for or take the full amount, the stock not then taken was to be reallotted *pro rata*, and the balance to remain in the treasury, to be sold from time to time as the requirements of the road necessitated. An immediate issue of $300,000 was authorized. The issue of preferred stock was begun January 1, 1901, and between that date and July 1, 1901, $230,000 in amount was issued. After the beginning of this action, and before the trial, sufficient preferred stock had been issued to bring the total amount at the time of trial to $270,000.

Mrs. Cahill-Emery, complainant, was not present at the meeting at which the surrender of the note for $292,925 and 2,500 shares of common stock was voted. A short time after the meeting, in the winter of 1901, Mr. Emery, as representative for Mrs. Cahill-Emery, came to Kalamazoo and consulted with Mr. H. C. Potter in regard to the transaction. Mrs. Cahill-Emery held coupon notes of the construction company amounting to $12,500. Mr. Potter proposed that she take payment in preferred stock. After some consideration, Mrs. Cahill-Emery decided that she did not care to take perferred stock, and desired the money on her notes. Payment was then deferred until later. In the meantime Mrs. Cahill-Emery became dissatisfied, and protested against the surrender of the note and stock by the construction company.

On July 5, 1901, the directors of the railway company held a meeting, at which were present defendants Woodbury, J. H. Dewing, C. A. Dewing, W. S. Dewing, H. F. Badger, and G. E. Dunbar. These gentlemen held the majority of preferred stock then issued. At this meeting, after stating in a preamble the action of November 15, 1900, and the authorization of an issue of preferred stock and the surrender of the note for $292,925 and 2,500 shares of common stock, it further states that it now appeared that the proposal submitted did not meet with

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the approval of all the members of the construction company, and that there was some misapprehension and dissatisfaction with the action taken. It was then voted to return to the construction company the 2,500 shares of common stock and the note for $292,925, and take back from the construction company its note for $67,925; "thus placing the two companies in the same position which they occupied prior to November 15, 1900." Pursuant to this vote the note for $292,925 was returned to the construction company by the railway company, and the common stock of the railway company, which had been issued as a bonus with the preferred stock, was returned by the persons who received it to the railway company, and by it turned back again to the construction company. Mr. Potter testified that Mrs. Cahill-Emery, the complainant, was the party dissatisfied, and was objecting to the proceedings. Mrs. Cahill-Emery was never a stockholder of the railway company. On July 9th, and four days after the railway company voted to return the note for $292,925 and 2,500 shares of common stock, Mr. Emery, in behalf of Mrs. Cahill-Emery, demanded and received payment on coupon notes of the construction company ($12,500) which Mrs. Cahill-Emery held, and payment of which the railway company had assumed by the act of November 21, 1895.

June 21, 1901, notice was sent out by the construction company, calling a special meeting of the members July 5, 1901, "for the consideration of a final settlement with the Chicago, Kalamazoo & Saginaw Railway Company, the distribution of the assets of the construction company, and the transaction of such other business as may be brought before the meeting." This meeting was adjourned to July 12th, when the meeting was held. At this meeting Mr. Emery, representing the complainant, was present, accompanied by counsel. The following preamble and resolution was offered by J. H. Dewing, and seconded by Mr. Woodbury:

"*Whereas*, the duration of the Kalamazoo & Hastings

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Construction Company, Limited, expires by limitation September 21, 1901; and

"*Whereas*, this company holds an obligation of the Chicago, Kalamazoo & Saginaw Railway Company for $292,925, which is offset in part by an obligation of this company for $67,925; and

"*Whereas*, it is deemed expedient and advisable that the assets of this company be placed in such shape that they can be divided among its members: It is therefore

"*Resolved*, that the board of managers of this company be and are hereby authorized to accept from the Chicago, Kalamazoo & Saginaw Railway Company 2,250 shares, $100 each, of its common stock, and this company's note for $67,925, now held by the Chicago, Kalamazoo & Saginaw Railway Company, in full payment of their obligation of $292,925 and all other demands whatsoever."

Mr. Emery objected and filed a written protest. He also offered a substitute resolution as follows: "That the Kalamazoo & Hastings Construction Company, Limited, go into liquidation according to the laws of the State of Michigan,"—which was not seconded. The resolution being put to vote, the defendants voted "Yes," and Mr. Emery voted "No."

At the same meeting the following preamble and resolution was offered:

"*Whereas*, all the debts of this company have been assumed by the Chicago, Kalamazoo & Saginaw Railway Company; and

"*Whereas*, this company now has in its treasury 6,750 shares, $100 each, of the common stock of the Chicago, Kalamazoo & Saginaw Railway Company: Now, therefore, be it

"*Resolved*, that the board of managers of this company [meaning said construction company] be and are hereby authorized to divide among the members of this association the $675,000 of the common stock of the Chicago, Kalamazoo & Saginaw Railway Company now in its treasury *pro rata* according to the individual holdings in the company, taking individual receipts therefor."

On this resolution the defendants present voted "Yes," and Mr. Emery voted "No."

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Immediately after the former vote a recess was taken, during which time a meeting of the railway company, which had already been called, passed a resolution accepting the proposition of the construction company to surrender the note for $292,925, offset by the construction company obligation for $67,925 and interest, and to accept in lieu therefor 2,250 shares of common stock of the railway company; and it was further voted to issue 2,250 shares of common stock of the railway company, and deliver the same to the construction company, with its note for $67,925; the same to be in full payment of all demands whatsoever. Pursuant to this resolution the railway company did issue 2,250 shares of common stock, and delivered the same to the construction company.

Mr. Potter testified that the consideration for this issue of stock was the note for $292,925, and nothing else. He also testified that the property value of this railroad had not been increased by this increase of stock, except that the obligation of the railroad had been paid, and that the net note of $225,000 was an obligation of the railway company. Mr. J. H. Dewing, manager of the road, testified that the issue of 2,250 shares of common stock decreased the indebtedness of the railroad $225,000. Mr. Potter further testified that the meeting was "cut and dried," and the resolutions prepared under the direction of Mr. Woodbury and the Dewings; that they consulted with Mr. Howard, as counsel for the railway company, in regard to it. Mr. Potter testified that previous to the meeting of July 12, 1901, the assets of the construction company consisted of the net note of the railway company for $225,000 and 4,500 shares of stock in the railway company; that after the meeting of July 12, 1901, the assets consisted of 6,750 shares of common stock of the Chicago, Kalamazoo & Saginaw Railway Company; that the vote of July 12th distributing the shares of common stock to the individual members of the construction company distributed all the assets of the company. The construction company had done no business as a construction

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company since November 21, 1895. Between the meeting of July 12, 1901, and the time of expiration of the corporate life of the construction company, September 21, 1901, no business act was done by the construction company, and no further act towards dissolving the company was taken. Mr. Potter testified that he received the certificates for 2,250 shares of common stock of the railway company in payment for the net note of $225,000, and that he held the proportionate interest of the members of the construction company in his possession subject to their order.

It does not appear that any of the certificates of common stock of the railway company have been distributed to the individual members of the construction company. The defendants are now the owners or holders of all but a few shares of the preferred stock of the railway company. On or about August 5, 1901, the complainants made a formal request upon the officers of the construction company that they procure the redelivery of the net note for $225,000, and that they bring suit to set aside the whole transaction as being unlawful and fraudulent, which request the construction company, by its officers and board of managers, refused. Thereupon the complainants brought their bill. On the hearing, on pleadings and proofs, the bill of complaint was dismissed, and from this decree the complainants appeal.

The vital question in the case is whether the action of July 12, 1901, should be sustained. Section 9 of the act providing for partnership associations (being section 6087, 2 Comp. Laws) reads as follows:

"When any such partnership association shall be dissolved by the voluntary action thereof, its property shall be applied and distributed as follows: *First*, to the payment of all debts for wages of labor; *second*, to the satisfaction of its other liabilities and indebtedness; *third*, after payment thereof, the same shall be distributed to and among the members thereof, in proportion to their respective interests, in the following manner: *Fourth*, three liquidating trustees shall be elected by the members of the association, who shall have full power and authority to

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wind up the concern, and distribute the net assets thereof among the members, under the direction of the circuit court of the proper county."

If this section applies to the action taken on July 12th, it is very clear that it was not followed. But it is contended that it does not, first, because this was not a voluntary winding up of the affairs of the partnership association, but was, rather, a termination of the business at the end of its term. We think this is not strictly accurate. The partnership term did not end until September 21, 1901. This action was taken in July preceding, and, so far as it amounted to a dissolution of the partnership association, it constituted a voluntary dissolution. The notice sent out to the members was a notice of a meeting for the consideration of a final settlement of the partnership affairs and the distribution of the assets of the company. The resolution was a resolution for the division of the stock to be acquired by the trade *pro rata* among the shareholders in the partnership, according to the individual holdings in the company. We think it clear, therefore, that this was a scheme for the winding up of the affairs of the company, and that it is not authorized by the terms of this statute. We think it was entirely beyond the power of the majority stockholders to wind up the affairs of this company by exchanging its valuable property for shares of stock in another corporation, and compelling a certain shareholder to become a member of such corporation and to accept stock for his holding. We are unable to distinguish the case in this respect from *Mason* v. *Mining Co.*, 133 U. S. 50 (10 Sup. Ct. 224), where the whole subject is discussed, and the conclusion reached that such authority does not exist. See, also, 1 Mor. Corp. §§ 415, 416.

But it is claimed that complainant is estopped from objecting to this transaction by reason of her having accepted the money in payment of the coupon notes, after preferred stock had been issued in pursuance of the agreement of October 11 and November 15, 1900. It is very clear that she is not estopped from objecting to the dispo-

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sition of this $225,000 net note, made on July 12, 1901, as this action had not been taken at the time she received pay on the coupon notes; and, furthermore, when the coupon notes were paid, the action by which the $225,000 net note had been surrendered to the railway company had been rescinded by both the companies, and the note returned to the construction company. The complainant then received her pay upon the coupon notes, as she had an undoubted right to do, unless the holders of the preferred stock should take some action to repudiate their purchase, either on the ground of fraud or want of power. No such action appears to have been taken by the holders of the preferred stock. So far as the record discloses, no complaint is made by them of the action of the railway company in rescinding the action of November, 1900, and in returning the $225,000 net note to the construction company. Indeed, the holders of nearly all the stock were parties to this transaction. If the preferred stockholders are content to rest upon the transaction as it stood after the rescission of the action of 1900, which was taken with the express purpose of placing the two companies in the same position which they occupied prior to November 15, 1900, it does not rest with them to complain that provision shall be made for the payment of the claim of the construction company in accordance with the legal rights of the respective parties; and we do not find that an estoppel arises against the complainant for having accepted payment for her coupon notes.

We do not overlook the contention of defendants' counsel that complainants are not in position to complain, for the reason that the payment of this note in the manner in which it was paid, provided for by the resolution of July, 1901, amounted to the surrendering of something of no value for stock of the railway company. The argument is this: That, as the construction company owned all the stock which the railway company had issued up to this time (not all of its authorized issue), the construction company was really debtor to itself, and that no harm was

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done by the surrender of this $225,000 net note. But the fact remains that from the inception of these two companies, for reasons of their own, the parties formed and maintained to the last two organizations. There was no identity of corporations, nor can the stockholders of one company be said to be identical with the company itself. The rights of the construction company must be determined upon the same principles as though the stockholders were a different set of people.

We think the decree should be reversed, and the vote of July 12, 1901, be declared void and of no effect, and that the $225,000 note be returned to the construction company, and the 2,250 shares of the common stock of the railway company issued in place thereof be delivered up and canceled, and that the construction company be dissolved and wound up according to law, and its assets sold and converted into cash, and distributed among the shareholders as their interest may appear; or, at the election of the defendants, inasmuch as complainant is the only complaining party, a decree will be entered for the complainant for her one-sixteenth interest in the $225,000 net note, and providing for a sale of the stock of the railway company held by the construction company, and for the payment to complainant of one-sixteenth of the price at which it sells. The complainants will recover costs of both courts.

The other Justices concurred.

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FISCHER *v.* GOLDIE.

MASTER AND SERVANT — PERSONAL INJURIES — ASSUMPTION OF RISK.

A servant who was injured by a hoop thrown out of a planer because of a roller becoming loose in its box, and dropping down on one side, assumed the risk, where it appeared that a

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millwright repaired the box that morning in the same manner which had been customary for two months previous, and that, after being repaired, it would run for a time, and then drop out again, with which facts the servant was familiar, and that the danger was not concealed.

Error to Bay; Shepard, J. Submitted January 14, 1903. (Docket No. 42.) Decided March 30, 1903.

Case by William Fischer against William Goldie for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

T. A. E. & J. C. Weadock, for appellant.

E. A. Cooley, for appellee.

MONTGOMERY, J. The plaintiff, a young man, 26 years of age, was employed by the defendant in planing hoops on a planer constructed especially for that purpose. The machine was kept in repair by a millwright. The base of the machine was made of two cast-iron side frames about 36 inches high and about 8 feet long. A general outline of the top of the machine was that of the top of a table. This top was covered with brass plates, upon which the material would work easily. There were three sets of rollers, two rollers in each set; the first set called the "feed" rollers, the second set the "receiving" rollers, and the third set the "discharging" rollers. One roller of each set was adjusted above the top of the table, and the other below, the surfaces of the lower rollers projecting through and above the face of the table, so that, when the two rollers revolved, the material fed into them from the front end on top of the table would be carried through and out the other end. Between the feed rollers and receiving rollers there were two knives attached to one arbor adjusted below the surface of the table, and extending clear across it, a distance of 28 inches. These knives, instead of being smooth as in an ordinary planer, were

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shaped with a tooth that projected up. The cutting edge of the knife formed the hoops, and the teeth separated them; so that each of the knives was composed of a series of upwardly projecting teeth, and between the teeth a knife surface of about an inch and a quarter wide. The knives were placed one on each side of the arbor, which revolved rapidly at a speed of 4,000 revolutions a minute. The knives were covered by a pressure bar, so that pieces would not fly out, and the mechanism was thus concealed from the view of the workman.

The material which was used on the planer was prepared from elm logs. The log is first steamed, and then slices about the thickness of a hoop are cut off from it. These slices, called "sheets," are carried by means of a conveyor to the planer, and are pushed through the feed rolls, so that the revolving knives coming in contact with them plane them and cut them into separate hoops, and the receiving rollers take hold of them and carry them through. The knives extend far enough through a slot in the table to shape, plane, and separate the hoops with a downward stroke. The top rollers were all weighted down at the bearings. The lower rollers worked in solid boxes. The space between the rollers was less than the thickness of a hoop, and in that way purchase upon the "sheets" and the hoops was secured.

The plaintiff observed that the machine was not working properly about one month before the accident, and the millwright fixed it. Again the day of and before the accident he called the attention of the millwright to the fact that it did not seem to be working properly, saying to him that the second set of rollers—that is, the middle set, or receiving rollers—would not draw the hoops through. The millwright, who was charged with the duty of keeping the machine in repair, and who represented Mr. Goldie,—Mr. Goldie not being present,—said he would fix the machine. The millwright went and looked at it, attempted to fix it, said it was all right, and to go ahead with the work. The plaintiff went ahead, and, after putting certain sheets

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through the machine, and while leaning over to take up another, one of the hoops which the receiving rollers failed to carry through was caught by the teeth of the knives, forced back through the first set of rollers, struck the plaintiff on the leg above the knee, and ran up his limb, injuring his scrotum and groin, bursting a blood vessel, and doing other injuries, from the effects of which he will never recover.

Plaintiff's claim is that the hoop was thrown back because the lower of the second or receiving set of rollers was permitted to drop down in the box on one side, so that the surface of the roller was below the table, and the sheet, as cut into hoops, lay in the machine, and was not carried through, because the rollers in that condition could not perform their function. It is also the claim of the plaintiff that the manner of attempting to repair this box was improper. But it appears by his testimony that it had been the practice for two months for the millwright to fix this box in the same way, and the rollers would then work all right for a time, and then get out of place again; that he spoke to the millwright about the machine a month before the injury, and he repaired the box by driving tins into it; and again on the morning of the injury the same thing occurred. The plaintiff was as familiar with the methods employed by the millwright to remedy the defect as was the millwright himself. He knew the result which had followed on previous occasions. He must have known that it was simply a question of time when the roller would again drop down. There was nothing concealed or hidden in the danger. The whole machinery was open to his observation, and we think the circuit judge committed no error in holding that the plaintiff assumed the risk. *Wheeler* v. *Berry*, 95 Mich. 250 (54 N. W. 876); *Lamotte* v. *Boyce*, 105 Mich. 545 (63 N. W. 517); *Hayball* v. *Railway Co.*, 114 Mich. 135 (72 N. W. 145).

The judgment is affirmed, with costs.

The other Justices concurred.

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CENTRAL SAVINGS BANK *v.* O'CONNOR.

1. BILLS AND NOTES—CONDITIONAL DELIVERY—EVIDENCE.
   Parol evidence is admissible to prove that a promissory note, unconditional in terms, was placed in the hands of the payee with the understanding that it should not become a binding obligation until the happening of some event.

2. SAME.
   Parol evidence is inadmissible to introduce conditions or modifications of the terms of a promissory note which has been delivered into the hands of the payee, to take effect presently as the obligation of the maker.

3. SAME.
   In an action upon a note unconditional in terms, given for the purchase price of a chattel mortgage and note, evidence is inadmissible to show that it was given with the understanding that it should become void if the maker of the chattel mortgage should be declared a bankrupt.

4. SAME—CONSIDERATION—BANKRUPTCY.
   Where a note, indorsed by persons against whom it may be enforced, and a chattel mortgage, are given as the consideration of other notes, the consideration does not wholly fail, though the maker of the former note becomes a bankrupt.

5. GENERAL AND SPECIAL VERDICT—JUDGMENT.
   Where there is no special verdict inconsistent with the general verdict, a judgment *non obstante veredicto* should not be entered.

Error to Wayne; Donovan, J. Submitted February 3, 1903. (Docket No. 66.) Decided March 30, 1903.

Assumpsit by the Central Savings Bank against George M. O'Connor and William J. Hammond on promissory notes. From a judgment for plaintiff *non obstante veredicto*, defendants bring error. Reversed.

Charles W. Casgrain (*E. A. Fink*, of counsel), for appellants.

Barbour & Rexford, for appellee.

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MONTGOMERY, J. This action is brought upon two promissory notes aggregating $1,523.47, made by the defendant O'Connor and indorsed by the defendant Hammond. The notes bear date February 1, 1901. The plaintiff made its case by introducing them in evidence. The defendants then offered to show by a parol agreement made at the time said notes were executed, and which is set out in a notice under the general issue, in substance as follows: That the notes were given for the amount of a chattel mortgage which plaintiff held upon the property of the J. R. Pearson Company, which property defendant O'Connor had purchased; that the title to said notes never passed to said plaintiff; that the notes were delivered to plaintiff upon the clear and distinct understanding and condition, agreed to by said plaintiff, that in case the said J. R. Pearson Company should thereafter be forced into bankruptcy by any of its creditors, upon proceedings instituted by them for that purpose, and adjudicated a bankrupt, said notes would thereupon, in the event of the happening of such contingency, become and be null and of no effect, and were not to be paid, and that it was upon said condition said notes were delivered to said plaintiff; and that it accepted and held, and still holds, them, and each of them.

The evidence of the defendants upon this subject, which is most favorable to the defense, is, in substance, this: That the notes were executed in consideration of the transfer by the plaintiff to the defendant of a chattel mortgage and accompanying note of the J. R. Pearson Company, which note was indorsed by J. R. Pearson, F. H. Crawford, and A. J. Franklin. Defendant testifies that, after the notes were signed and indorsed, he then said to Mr. Fox, plaintiff's representative:

"These notes are delivered to you on the condition that if this concern is put in bankruptcy by reason of any of these creditors petitioning because of this chattel mortgage having been given, or an execution having been levied and the goods sold under the execution, which are both acts of bankruptcy, then the notes are to be null and void; and Mr. Fox says, 'That is my understanding of it, and I ac-

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cept them so;' and he says, 'You know that there is nothing going to be done about it.'"

On the trial of the case the court submitted the case to the jury upon the instruction that, if the claim set up by the defense was true, the plaintiff could not recover. The jury returned a verdict for the defendants. Afterwards a motion for a new trial or for the entry of a judgment *non obstante veredicto* was entered, and the court, after consideration, entered a judgment for the plaintiff *non obstante veredicto*. The defendants bring error.

The meritorious question is whether the defense set out in this notice is one which can be established by parol testimony. It is doubtless true, as contended by the appellants' counsel, that it may be shown that a promissory note, unconditional in terms, was conditionally delivered; that is to say, that it was placed in the hands of the payee, but with the distinct understanding that it was not to be operative or to become a binding obligation until the happening of some event. *Brown* v. *St. Charles*, 66 Mich. 71 (32 N. W. 926); *Burke* v. *Dulaney*, 153 U. S. 228 (14 Sup. Ct. 816). On the other hand, the rule is firmly established that where a promissory note for a certain amount, payable at a certain time, is delivered into the hands of the payee, to take effect presently as the obligation of the defendant, parol evidence to introduce conditions or modifications of the terms is not admissible. The case of *Hyde* v. *Tenwinkel*, 26 Mich. 93, illustrates this rule. It was there held that an attempt to show a verbal contemporaneous agreement to reduce a note from an absolute and specific promise to a defeasible engagement was inadmissible. The same rule has been followed, one of the recent cases being *Phelps* v. *Abbott*, 114 Mich. 88 (72 N. W. 3); *Burns & Smith Lumber Co.* v. *Doyle*, 71 Conn. 742 (43 Atl. 483, 71 Am. St. Rep. 235). We think it clear that the present case falls within that line of cases which precludes parol evidence offered to vary the terms of a written instrument. If we adopt the testimony of the defendant as correctly stating the transaction, and more

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certainly if we adopt the terms of the notice of defense by which the defendant was bound, these notes were delivered to take effect presently, but upon the alleged parol agreement that they were to become void in the event that a certain contingency should happen. This is no more than averring that plaintiff entered into a contemporaneous parol agreement that, while the defendant's obligation bound him to pay absolutely the sums of money at specified times, yet in a certain contingency this sum should not be payable at all, and the notes be redelivered.

It is suggested, also, that there was a total failure of consideration. This cannot be held, for the reason that there was transferred to the defendant, in consideration for the notes, the chattel mortgage and promissory note of the J. R. Pearson Company, which note had indorsers against whom it would be enforceable. There was no absolute and total failure of consideration, and no defense of partial consideration was noticed under the general issue.

We think, however, that the practice adopted in this case was mistaken. There is no verdict which supports the judgment entered *non obstante veredicto*. Had there been a special verdict inconsistent with the general verdict, such a judgment might have been proper.

We think the case should be reversed and remanded for a new trial. No costs will be awarded to either party on this hearing.

The other Justices concurred.

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NICHOLS *v.* MONJEAU.

1. SALE BY BAILEE—AUTHORITY.
   A bailee of property has no apparent authority to sell, and devest the owner of his property. *Trudo* v. *Anderson*, 10 Mich. 357.

2. SAME—KNOWLEDGE OF BAILOR—ESTOPPEL.
   The fact that plaintiff did not proceed at once to assert his rights to his property by replevin after learning that it was in the possession of one who had purchased it from his bailee does not estop him from recovering it from a subsequent purchaser, where he had no knowledge of an intent of the vendee to further transfer it.

Error to Baraga; Streeter, J. Submitted February 18, 1903. (Docket No. 95.) Decided March 30, 1903.

Replevin by Edward Nichols and another against Victor Monjeau. From a judgment for plaintiffs on verdict directed by the court, defendant brings error. Affirmed.

C. F. Button, for appellant.

Ira E. Randall, for appellees.

MONTGOMERY, J. Plaintiffs owned a team of horses. They intrusted them to a teamster, named Baker, to take into the lumber woods, and do teaming. Near the end of the season Baker sold the team of horses to one Conley. Conley kept the horses until about the 1st of April; then sold them to defendant. Plaintiffs' testimony shows that, while they learned that the team had been sold very shortly after the sale took place, they did not find out who purchased them until in May or June. Early in July they saw defendant, and made a demand for the team, which being refused, this action of replevin was brought. On the trial the circuit judge directed a verdict for the plaintiffs. Defendant brings error.

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Baker, having no title, could pass none. *Trudo* v. *Anderson*, 10 Mich. 357 (81 Am. Dec. 795). The doctrine of apparent authority has no application to such a case, as the case cited rules that a bailee of property has not the apparent authority to sell, and devest the true owner of his property.

Defendant's counsel requested the court to charge the jury that, if the plaintiffs knew that the team had been sold shortly after the sale took place, and failed to disaffirm the sale, they would be estopped from now asserting title as against the defendant, who purchased at a later time. There was testimony on the part of the defendant tending to show an admission of the plaintiffs that they knew, shortly after Conley bought the team, that the team had been sold to him, and the question presented is whether the failure to take prompt action to recover the team estops them. The plaintiffs are not shown to have had any knowledge of any purpose of Conley to transfer the team. They simply delayed bringing an action against him, which they were entitled to do. The case is unlike the cases cited by defendant's counsel, wherein the doctrine of estoppel was applied to one who has a duty to speak, knowing that his silence will result in another placing himself in a different position. Unless the mere fact that plaintiffs knew of Conley's possession called upon them to proceed at once to assert their rights by replevin, there could be no room for the doctrine of estoppel. We do not think this is the rule.

The direction was proper, and the judgment will be affirmed, with costs.

The other Justices concurred.

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LUCKING *v.* BALLANTYNE.

1. TAXES—LIEN—CHATTEL MORTGAGE—PRIORITY.
   A charter provision that all city taxes upon personal property shall be a lien thereon until paid, and no transfer of the property assessed shall operate to devest or destroy it, does not give the city a prior lien for taxes over the lien of a chattel mortgage given before the assessment.

2. SAME—RECEIVERS.
   A tax assessed against a chattel mortgagor cannot be enforced against a receiver appointed on the foreclosure of the mortgage, which was given before the property was assessed.

Appeal from Wayne; Donovan, J. Submitted February 18, 1903. (Docket No. 104.) Decided March 30, 1903.

Petition by Thomas M. Lucking, receiver of taxes for the city of Detroit, against John Ballantyne, receiver of W. J. Gould & Company, to compel the payment of certain taxes. From a decree for petitioner, defendant appeals. Reversed.

John W. McGrath (*Timothy E. Tarsney*, of counsel), for petitioner.

Henry B. Graves, for defendant.

CARPENTER, J. Defendant Ballantyne, the receiver in the above-entitled cause, asks this court to set aside a decree rendered by the court below, compelling him to pay the petitioner, the receiver of taxes of Detroit, $1,714.14 for city taxes assessed against the defendant corporation, W. J. Gould & Co., as the owner of the receivership property. The facts are as follows: On February 28, 1902, W. J. Gould & Co. executed and delivered to said Ballantyne, as trustee, a mortgage upon its stock of goods and other personal property, situated in the city of Detroit,

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to secure the payment of the aggregate amount of $84,740, owing to a number of its creditors. March 1, 1902, said Ballantyne was appointed receiver of the property covered by said mortgage in this suit, instituted for the purpose of its foreclosure. Until July 12, 1902, said mortgaged property was sold in the ordinary course of trade. The balance undisposed of was sold in a lump at that time. The property covered by the chattel mortgage is insufficient to pay all the debts secured thereby. The assessment for the taxes in question was made against W. J. Gould & Co. It is insisted that the decree of the court below can be sustained on two grounds: (1) That the lien created by the law for the payment of taxes is superior to the lien created by the chattel mortgage under which the receiver holds; (2) that the assessment may stand as an assessment against the receiver.

1. The lien for taxes is given by section 10 of chapter 10 of the charter of the city of Detroit (see Act No. 472, Local Acts 1901), which reads as follows:

"All city taxes upon personal property shall be and remain a lien thereon until paid, and no transfer of the personal property assessed shall operate to devest or destroy such lien."

It is not necessary to decide whether the tax lien attached April 1st, when the property was listed for assessment, or July 1st, when the tax roll was placed in the hands of the receiver for collection. See *Eaton* v. *Chesebrough*, 82 Mich. 214 (46 N. W. 365). The mortgage was given several weeks, at least, before the tax lien attached. The question, then, is, Does the language of the section above quoted make the lien for taxes superior to liens existing when such tax lien takes effect? Clearly, nothing in the language of the statute would lead to any such conclusion. The provision, "No transfer of the personal property assessed shall operate to devest or destroy such lien," unquestionably refers to transfers made after the lien attaches. It does not apply to transfers made before. Such transfers might prevent the lien attaching, but by no pos-

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sibility could they "devest or destroy" it. The legislature, having in express terms made this tax lien superior to subsequent transfers, clearly indicates, by omitting to specify its effect on prior transfers, an intent that it shall not be superior to them. The argument that the tax lien under consideration is superior to prior liens and transfers, because a tax lien on land is superior to such transfers, assumes a resemblance between taxes on land and taxes on personalty which does not exist. In the case of a tax on land, it may be stated as a general proposition that the land, and not the owner, is taxed. Purchasers and all persons interested in land understand this, and must pay the taxes as a condition of enjoying their property. It is otherwise with personal property. There the tax is against the person, because he owns personal property. It has always been the policy of the law—supposedly in the interest of trade—to make personal property easily transferable, and to secure to purchasers and mortgagees the entire title of the seller and mortgagor. It would be a radical change, indeed, in that policy, if their title is to be destroyed by a tax subsequently assessed against the person from whom that title was acquired. When the legislature intend to make such a change, it is to be presumed that they will indicate that intent by appropriate language. By the legislation in question they have not only failed to indicate it, but they have, as already stated, used language which is inconsistent with any such intent.

2. Is the tax to be treated as a tax assessed against the receiver? It is obvious, and it is distinctly contended by petitioner, that W. J. Gould & Co., notwithstanding the mortgage and appointment of the receiver, had a taxable interest in this property. It is obvious, too, that each of the creditors secured by the mortgage in question was liable to taxation for his credit secured by said mortgage. This record does not indicate, nor are we to presume, that such taxes were not paid. If it is also true (and this is a proposition which we by no means affirm) that the receiver was liable to taxation as the owner of an interest in said property,

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it is sufficient to say that he was under no obligation to pay the tax assessed against W. J. Gould & Co.

The decree of the court below must be reversed, and the petition dismissed.

The other Justices concurred.

BEUTEL v. WEST BAY CITY SUGAR CO.

1. STREETS—VACATION—NOTICE—DAMAGES.
   One who is not entitled to notice of proceedings to vacate a street cannot recover damages of a person for causing it to be closed.

2. SAME—PROPERTY OWNERS.
   One who has no property or private right of way abutting upon a street which has been vacated cannot complain.

Error to Bay; Connine, J., presiding. Submitted October 7, 1902. (Docket No. 3.) Decided April 7, 1903.

Case by Robert Beutel against the West Bay City Sugar Company to recover damages for an alleged interference with a right of ingress and egress to a street. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Hall & Brockway (*Morris L. Courtright*, of counsel), for appellant.

T. A. E. & J. C. Weadock (*Lee E. Joslyn*, of counsel), for appellee.

MONTGOMERY, J. The case can only be understood by referring to the accompanying plat.

Prior to February 4, 1899, plaintiff was the owner of blocks 6, 7, and 8, and A, B, C, D, E, F, and G. On the

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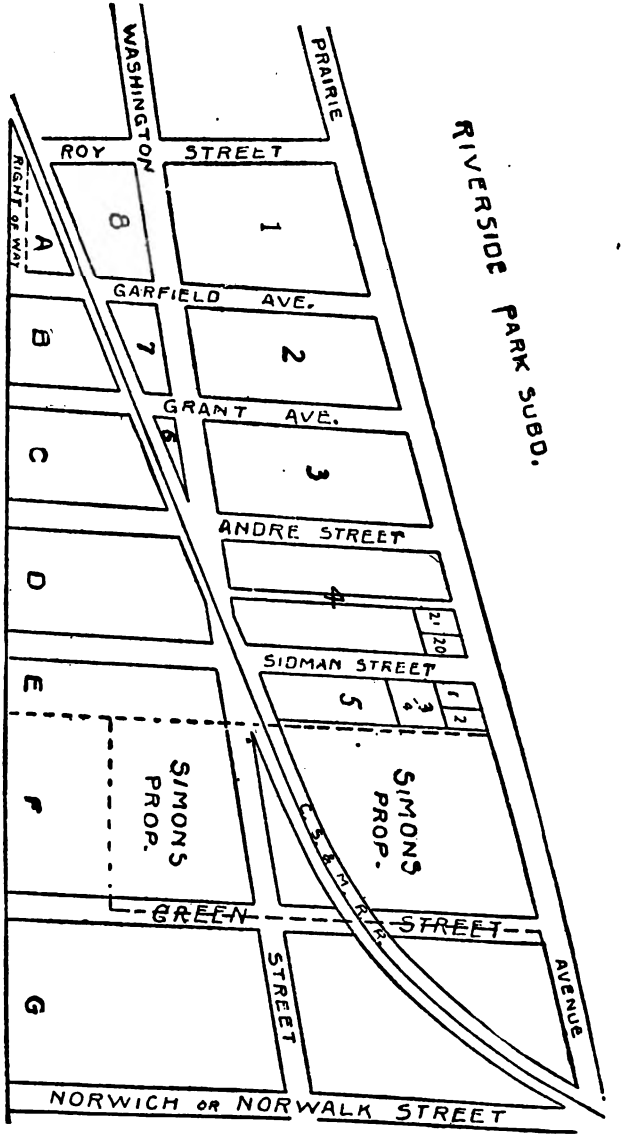
WASHINGTON
PRAIRIE
ROY STREET
RIGHT OF WAY
GARFIELD AVE.
GRANT AVE.
ANDRE STREET
SIDMAN STREET
GREEN STREET
NORWICH OR NORWALK STREET
AVENUE
STREET
RIVERSIDE PARK SUBD.
SAGINAW RIVER
SIMONS PROP.
SIMONS PROP.
C. S. & M. R'Y.
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date mentioned he conveyed to Mendal J. Bialy blocks 6, 7, and 8, and also block A, excepting and reserving from the last description, "for the purposes of a public highway, so much and such parts thereof as would be contained within the line of Martin street if extended through and across the same." This would be that part marked on the plat "right of way," extending from the intersection of Roy street easterly to what appears on the plat as Garfield avenue. Prior to this sale the plaintiff had, on a petition filed by him, caused to be vacated Garfield, Grant, Andre, and Sidman streets south of Washington street. The purchase of this property by Bialy was in the interest of the defendant company, and the title was subsequently conveyed to it. The purchase was made for the purpose of establishing a beet sugar plant, and the defendant took measures to vacate Washington street east of Roy street, and the north and south streets intersecting Washington street, and proceedings were had in the circuit court for the county of Bay with this end in view. An order was entered vacating the streets, and the entire property fenced in, and the defendant's plant constructed thereon.

This action is brought by the plaintiff to recover damages for the alleged interference with his right of ingress and egress to Washington street. The plaintiff claims that the proceedings taken to vacate these streets were irregular; but we regard this question as unimportant, for, if the plaintiff is in position to maintain this action, it must be because he occupies such a relation to Washington street as that in any attempt to vacate it he would be entitled to notice of the proceedings, under the authority of *Phillips* v. *Highway Commissioner*, 35 Mich. 15. It is doubtless equally true that, if he occupies a position which would have entitled him to notice of these proceedings, he is entitled to recover damages for the injury to his means of egress and ingress which were interfered with by the closing of the street, unless it shall be held that he is not in position to complain for the reason that

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he has other means of egress and ingress through Norwalk street at the east, and through the public way reserved in his deed to Bialy,—a point which we need not, in the view we take of this case, consider.

Andre street is the only north and south street which was ever opened. Evidently, after it was opened, for the purpose of making a crossing, the railway company placed planking at the crossing with Andre street and the railroad track. Since this street south of Washington street has been vacated, this planking has not been removed, and the plaintiff's testimony is that the railway company has never interfered with the use of the crossing by the public. The plaintiff has no title to any part of Andre street lying within the track of the railway company, and it does not appear that Andre street is a street south of Washington street. The question is whether, under these circumstances, he shows a peculiar damage from the closing of Washington street other in kind from that which other owners of property in the vicinity have suffered.

Both parties rely upon the case of *Buhl* v. *Depot Co.*, 98 Mich. 596 (57 N. W. 829, 23 L. R. A. 392). In that case it was said:

"A distinction may well be held to exist between the injury which results to an abutting owner, or another so situated that the means of ingress and egress to and from his premises are cut off by a discontinuance of a street, and one owning land upon another street, or on the same street at a distance from the part of the highway discontinued."

It was further held, in substance, that where the discontinuance of the street left the premises of the plaintiff in a *cul de sac*, and without means of egress, the plaintiff might assert that he had suffered peculiar damages, and recover them. We have no purpose of departing from this rule. It is also undoubtedly true that, where one has a private right of way connecting his premises with a public way, he may be held to be an abutter on the street by means of the private right of way, and in such case a

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discontinuance of the public way would work him a peculiar injury. See *Phillips* v. *Highway Commissioner*, *supra*.

Does this case fall within the reason of this rule? There is nothing in this record to indicate that there is a highway crossing of this railway right of way acquired by sufferance, or that the plaintiff is either a lessee or licensee. He has, it is true, been suffered to use the same since the vacation of Andre street south of Washington street, but that he has acquired any rights as against the railway company or others is not made to appear by the record. We think, therefore, that it cannot be said that this plaintiff is shown in any sense to have property abutting upon Washington street, which has been discontinued. It should be stated that the portion of Washington street east of Andre street it is conceded is not open. It does not appear that the dedication has ever been accepted, nor does it appear that the railway company joined in the attempted dedication.

The circuit judge reached the conclusion that the plaintiff had not shown himself entitled to recover, and this judgment is affirmed, with costs.

HOOKER, C. J., MOORE and GRANT, JJ., concurred.

THOMSON v. McMORRAN MILLING CO.

1. RAILROADS—TRANSFER OF PROPERTY—SERVICE OF PROCESS—AGENTS.

   In a legal proceeding against a railroad company which has sold all its property to another company, service of process upon a ticket agent of the purchasing company does not confer jurisdiction, though the agent was formerly ticket agent for the defendant.

2. SAME.

   The provisions of the statute (2 Comp. Laws, §§ 6255, 6340) that,

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when a railroad company conveys its property to another corporation, the rights of pre-existing creditors shall not be prejudiced, and "all rights of creditors shall be preserved unimpaired, and the respective corporations shall continue to exist so far as may be necessary to enforce the same," do not authorize process in a suit against the selling company to be served on an agent of the purchasing company.

3. MOTION TO STRIKE—APPEARANCE.

A motion to strike from the files a suggestion of claim for *mesne* profits in an action of ejectment, for want of service and insufficiency, is not equivalent to an appearance, and a waiver of a want of service.

Certiorari to St. Clair; Thomas, J. Submitted October 8, 1902. (Docket No. 23.) Decided April 7, 1903.

Ejectment by John W. Thomson, Jr., and Kate V. Calder against the McMorran Milling Company, the Chicago & Grand Trunk Railway Company, and the Flint & Pere Marquette Railroad Company. Plaintiffs had judgment against defendant Flint & Pere Marquette Railroad Company, and filed a suggestion of claim for *mesne* profits. From an order granting a motion to quash the service and strike from the files the suggestion of claim, plaintiffs bring *certiorari*. Affirmed.

John B. McIlwain, for appellants.

Frederick W. Stevens (*Charles McPherson*, of counsel), for appellee Flint & Pere Marquette Railroad Co.

HOOKER, C. J. On January 27, 1899, the plaintiffs obtained a judgment in ejectment against the Flint & Pere Marquette Railroad Company, a corporation, impleaded with two other corporations, who recovered against the plaintiffs. The plaintiffs took a writ of error, and the case is now pending in this court. On January 1, 1900, the Flint & Pere Marquette Railroad Company transferred all of its franchises and railroad property to the Pere Marquette Railroad Company, a new corporation organized to purchase this and other railroad property. On January

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8, 1900, the plaintiffs filed a suggestion of damages, and served a copy on defendant's attorneys in the ejectment case. No rule to plead was entered at that time. On December 6, 1901, a rule to plead was entered, and a copy of the suggestion, with notice of the rule, was served upon one Stewart, the ticket agent at Port Huron of the Pere Marquette Railroad Company, who had been ticket agent at the same place for the Flint & Pere Marquette Railroad Company prior to the transfer, but had been in no sense its agent afterwards.

The appearance of the defendant was special, for the purpose of moving the court for an order striking from the files the document filed on January 8, 1900, and purporting to be a suggestion of a claim for rents and profits, for use and occupation, and for an order setting aside the service of a copy of such suggestion made upon Stewart on December 6, 1901, upon the following grounds, viz.:

1. Because the suggestion was not filed within one year after the docketing of the judgment.
2. Because no rule to plead was entered at the time of filing the suggestion, or within one year after docketing the judgment.
3. Because a copy of such suggestion, together with a notice of the rule to plead, was not served upon the defendant within a year from the time of docketing the judgment.
4. Because C. A. Stewart, upon whom the papers were served, was not then an agent of the Flint & Pere Marquette Railroad Company, nor a station agent of said company, nor was he in any way authorized to receive such notice or service for the defendant.

This motion purports to be based on the records and files of said cause, and affidavits filed with the motion, which affidavits pertain to Stewart's relation to the defendant company.

The motion has a double aspect: (1) It is designed to quash the service, and in that respect is similar to a plea to the jurisdiction; (2) it attacks the sufficiency of the suggestion, which it says is "in the nature of a declara-

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tion," and in this respect it may be said to be akin to a demurrer. The plaintiffs' counsel seems to have recognized this, and replied with an averment that the suggestion is sufficient in law, and prays for an issue of fact on the question of service. On the other hand, defendant's counsel claim that the filing of the suggestion within the time prescribed by statute is jurisdictional, and apparently raised the question upon the ground that the court has no jurisdiction of the subject-matter, and not to question the sufficiency of the paper as a pleading.

The proposed issues were as follows:

"1. Whether said service was made upon any station agent or ticket agent at the station or depot along the line or at the end of said defendant's railroad line, or on any other officer or agent, or acting officer or agent, of said defendant.

"2. That said defendant, the Flint & Pere Marquette Railroad Company, be required to show whether since the 1st of January, 1900, it has any agent or acting agent, officer, cashier, secretary, treasurer, or any station or ticket agent, in the city of Port Huron or in St. Clair county, or any person who is acting in that capacity, as representing such officer, agent, ticket or station agent.

"3. Whether the Flint & Pere Marquette Railroad Company, about January 1, 1900, became consolidated, under the statute, with other connecting railroad companies under the name of the Pere Marquette Railroad Company, a corporation, who entered into the possession and control of all the properties, rights, and franchises of the said Flint & Pere Marquette Railroad Company.

"4. Whether a writ of error was taken out by the plaintiffs against all of the defendants in the above-entitled cause, and service made upon all the defendants of notice of the issuing of the same, in accordance with the rules and practice of the court, and whether the return day of said writ of error has been extended by orders of the circuit court of St. Clair county until January 1, 1902.

"5. Whether on the filing of the suggestion of damages January 8, 1900, a copy thereof was served upon the firm of Atkinson & Wolcott, attorneys for the said Flint & Pere Marquette Railroad Company in the above cause.

"6. Whether proof of service of the notice of issuing of

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the writ of error was duly filed in accordance with the rules and practice of the court."

The defendant's counsel thereupon filed its consent to the first question, with a proposed modification, and alleged that the others were immaterial.

After hearing counsel, the court settled issues as follows:

"1. Was C. A. Stewart, the person on whom the suggestion of damages filed in this cause was served, such an officer, agent, or employé of the defendant, or so connected with its business, on December 6, 1901, as that service could be made on him, and bind the defendant, under the laws of this State?

"2. Whether a writ of error was taken out by the plaintiffs against all of the defendants in the above-entitled cause on January 26, 1900, returnable on the 7th day of March, 1900.

"3. Whether notice of the issuance of said writ of error was served upon all of the defendants in accordance with the rules and practice of court.

"4. Whether proof of service of the notice of the issuance of the writ of error was duly filed with the clerk of the Supreme Court in accordance with the rules and practice of the court.

"5. Whether the return day of the writ of error has been duly extended from time to time by orders of this court.

"6. Whether on the 8th day of January, 1900, a copy of the suggestion of damages filed in the above cause was served upon the firm of Atkinson & Wolcott, attorneys for said Flint & Pere Marquette Railroad Company."

Counsel for defendant took an exception. Counsel then produced testimony, and the court made a finding of fact and law as follows:

"*First.* That up to on or about the 1st day of January, 1900, the defendant the Flint & Pere Marquette Railroad Company had owned and operated a line of railroad extending into the city of Port Huron, county of St. Clair, and State of Michigan, and had a ticket office in the city of Port Huron, in said county, and that up to until the 1st day of January, 1900, one C. A. Stewart was employed

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by and acted as a ticket agent of said defendant the Flint & Pere Marquette Railroad Company, and on that date said Stewart ceased to be an agent or to act for said railroad company or otherwise.

"*Second.* That on or about the 1st day of November, 1899, the Pere Marquette Railroad Company was incorporated, and in and by its articles of incorporation it recites as follows:

"'In carrying out the purpose of this incorporation, the company contemplates the purchase of the properties, the rights, privileges, and franchises of the Flint & Pere Marquette Railroad Company, the Detroit, Grand Rapids & Western Railroad Company, and the Chicago & West Michigan Railway Company, and the ownership and the operation of the railroads of said companies as part of the railroad above described.'

"*Third.* That on or about the 1st day of January, 1900, the defendant the Flint & Pere Marquette Railroad Company sold and transferred to the Pere Marquette Railroad Company, a distinct corporation, all its railroads and property, and that since the 1st day of January, 1900, the railroad and property formerly owned and operated by the Flint & Pere Marquette Railroad Company has been owned and operated by the Pere Marquette Railroad Company; the same being an entirely new corporation, composed of different stockholders from those constituting the Flint & Pere Marquette Railroad Company.

"*Fourth.* That C. A. Stewart, on whom the suggestion of damages filed in this case was served, was not an agent or officer of the defendant the Flint & Pere Marquette Railroad Company after the 1st day of January, 1900, and was not such an officer, agent, or employé of the defendant Flint & Pere Marquette Railroad Company, or so connected with its business, on December 6, 1901, as that service of the suggestion of damages filed in this cause could be made on him, and thereby bind the said defendant, under the laws of this State.

"*Fifth.* That on or before the 1st day of January, 1900, the defendant the Flint & Pere Marquette Railroad Company ceased to be the owner of a railroad, and that since that date the defendant the Flint & Pere Marquette Railroad Company has not at any time transacted a railroad business or operated a railroad.

"*Sixth.* That a writ of error has been sued out of the Supreme Court, and served upon all the defendants in

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this cause, in accordance with the rules and practice of court.

"*Seventh.* That the writ of error was taken out by the plaintiffs in this cause against all the defendants therein on the 26th day of January, 1900, and returnable on the 19th day of March of the same year.

"*Eighth.* That proof of service of the notice of the issuance of the writ of error above mentioned was duly filed with the clerk of the Supreme Court in accordance with the rules and practice of court.

"*Ninth.* That the return day of said writ of error has been duly extended from time to time by the orders of this court until the 18th day of January, 1902.

"*Tenth.* I also found that the judgment was rendered in the circuit court in said cause on the 27th day of January, 1899, in favor of the plaintiffs against the defendant the Flint & Pere Marquette Railroad Company, and in favor of the other defendants, the McMorran Milling Company and the Chicago & Grand Trunk Railway Company, and against the plaintiffs; that on the 8th day of January, 1900, the plaintiffs filed a suggestion of a claim for *mesne* profits in this cause with the clerk of this court; that upon the filing of the same no rule to plead to such suggestion was entered.

"*Eleventh.* That on December 5, 1901, a rule to plead to such suggestion was entered in the common rule book of this court.

"*Twelfth.* That on the 6th day of December, 1901, a copy of the suggestion for *mesne* profits filed in this cause on January 8, 1900, was attempted to be served upon the defendant Flint & Pere Marquette Railroad Company, with a copy of the rule to plead thereto which had been entered on December 5, 1901, and notice of the entry of such rule to plead, by serving the same upon one C. A. Stewart, in the City of Port Huron, St. Clair county, Michigan; said Stewart then being the ticket agent of said Pere Marquette Railroad Company.

"Thereupon, due consideration thereof being had, the court doth find, as a matter of law, that there is no proper service made of such suggestion of *mesne* profits upon the defendant the Flint & Pere Marquette Railroad Company, such as would bind said defendant therein; and it doth therefore order that the motion be, and the same is hereby, sustained, and that the defendant the Flint & Pere Marquette Railroad Company do have an order of this court

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striking from the files of this cause the document filed therein on the 8th day of January, A. D. 1900, purporting to be a suggestion of claim for rents and profits, being in the nature of a declaration filed against the Flint & Pere Marquette Railroad Company (erroneously named therein the Flint & Pere Marquette Railway Company) for use and occupation.

"And the court further orders that the service of a copy of such suggestion in the nature of a declaration made upon one C. A. Stewart on the 6th day of December, 1901, be, and the same is, quashed, and that an order to that effect be entered on the journal of this court.

"N. E. THOMAS,
"Circuit Judge.

"Dated this 21st day of January, 1902."

The formal order entered is as follows, after the caption and title:

"In this cause the motion to quash service and to strike from the files the suggestion for *mesne* profits came on to be heard, and after hearing Frank T. Wolcott, attorney for defendant F. & P. M. Ry. Co., in favor of, and John B. McIlwain, attorney for plaintiffs, in opposition to, it is ordered that said motion be, and the same is hereby, granted.

"N. E. THOMAS,
"Circuit Judge."

Thereupon a writ of *certiorari* was issued from this court. An assignment of errors appears in the record, which was attached to the return of the circuit judge, which is said to include the records, files, and testimony taken in which rulings and exceptions appear. The remedy by *certiorari* is not questioned by counsel.

The service did not confer jurisdiction over the person of defendant, for all relations between itself and its former station agent were severed. He was thereafter as much a stranger to it as any third person would be.

Counsel makes the claim that the new corporation is an agent for the old, under the statute providing for consolidation of railroad companies (2 Comp. Laws, §§ 6255, 6279, 6339, 6340), and that service was properly made under section 10468. He asserts that the provisions "that noth-

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ing herein contained shall prejudice the rights of pre-existing creditors of the corporation from which such property and rights are purchased or leased," and "all rights of creditors * * * shall be and hereby are preserved unimpaired, and the respective corporations shall continue to exist so far as may be necessary to enforce the same," justify the claim that this service is sufficient. We think otherwise. That the transfer cut off plaintiffs' rights against the property of the Flint & Pere Marquette Railroad Company may or may not be true, but, as long as it is an existing corporation, it is entitled to have process served upon itself, rather than upon another, although there may be difficulty in serving process. The Michigan cases cited, viz., *Gardner* v. *Smith*, 7 Mich. 410 (74 Am. Dec. 722); *Turner* v. *Tunnel Co.*, 102 Mich. 580 (61 N. W. 72); *Ryerson* v. *Wayne Circuit Judge*, 114 Mich. 352 (72 N. W. 131),—do not go so far as the contention in this case, and no case is cited in which a purchaser has been held to be an agent of the vendor for such purposes.

We are not convinced that the other point is well taken, but think that it should not be passed upon on this record. It is urged that, by raising that question, the defendant waived the question arising over the service. It is clear that such was not the intent of defendant's counsel, and, if it be true that the court had jurisdiction over the subject-matter, the motion to strike the suggestion should not be treated as equivalent to an appearance.

The order of the learned circuit judge is affirmed, with costs, upon the ground that jurisdiction over the person was not obtained.

MOORE, GRANT, and MONTGOMERY, JJ., concurred.

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JUST *v.* STATE SAVINGS BANK OF IONIA.[1]

1. BANKS—TRANSFER OF STOCK—VALIDITY.
   A holder of bank stock, who was indebted to the bank, desiring to qualify himself for the office of State Bank Commissioner, transferred his stock to his wife, who gave the bank her note in reduction of his indebtedness. He ceased to be an officer, and she was elected a director. *Held*, that none of the three parties could maintain that the transaction was merely colorable and void.

2. SAME—CONSENT OF DIRECTORS.
   A by-law of a bank, forbidding a transfer of stock by one who is indebted to the bank without the consent of the board of directors, does not invalidate a transfer of stock by such debtor, where the purchaser assumes the debt, and the board, without questioning the validity of the transfer, recognizes it by electing the purchaser a director.

3. SAME—BY-LAWS—LIEN OF BANK—BONA FIDE PURCHASERS.
   Neither a by-law of a bank nor an agreement between the bank and a stockholder, that the bank shall have a lien on the stock for the amount of the stockholder's indebtedness not then due, is binding upon *bona fide* pledgees of the stock for value.

4. HUSBAND AND WIFE—AGENCY—EVIDENCE.
   A statement by a husband that he is authorized to pledge his wife's stock to secure his debt does not tend to prove his authority.

5. SAME—SURETY—PLEDGE OF PROPERTY.
   While a married woman cannot incur a personal obligation by becoming a surety for her husband, she may pledge her bank stock to secure his debt.

6. BANK STOCK—LIEN FOR DEBT—PLEDGE OF STOCK.
   A bank stockholder gave her note to the bank, and then pledged her stock for her husband's debt to another bank. The latter bank gave the first bank notice of the pledge. The first bank claimed a lien on the stock to secure the note by virtue of a by-law and an agreement with the stockholder. The second bank had no knowledge of either agreement or by-law. *Held*, that the first bank could not assert a prior lien.

[1] Rehearing denied May 29, 1903.

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7. SAME—NOTICE.
A *bona fide* purchaser or pledgee of bank stock for value does not take it subject to the bank's lien under 2 Comp. Laws, § 6098, for a debt subsequently falling due, where the bank has notice of the purchaser's or pledgee's rights.

8. BONA FIDE PURCHASERS—CONSIDERATION—EXTENSION OF TIME.
An extension of time for the payment of a pre-existing debt is a sufficient consideration to constitute the creditor a *bona fide* holder in taking stock as security for the debt.

Appeal from Ionia; Davis, J. Submitted October 9, 1902. (Docket No. 37.) Decided April 7, 1903.

Bill by William J. Just and Isaac N. Just, administrators of the estate of Josiah E. Just, deceased, against the State Savings Bank of Ionia, the Belding Savings Bank, the Ionia County Savings Bank, and Ella V. Just, to reduce to possession and determine the title to certain certificates of stock. From the decree rendered, complainants and the Ionia County Savings Bank appeal. Modified.

Morse & Locke, for complainants.

A. A. Ellis and *E. M. Davis*, for defendant Ionia County Savings Bank.

George E. & M. A. Nichols, for defendants State Savings Bank and Belding Savings Bank.

HOOKER, C. J. Josiah E. Just died on February 19, 1898, and the complainants were soon after appointed administrators of his estate. They filed the bill in this cause to reduce to possession and settle the title to nine certificates of stock of the Ionia County Savings Bank in the interest of Just's general creditors, the estate being alleged to be insolvent. The certificates were numbered from 1 to 9, inclusive. The defendants are the State Savings Bank of Ionia, the Belding Savings Bank, the Ionia County Savings Bank, and Ella V. Just, the widow of the intestate. The complainants and the Ionia County Savings Bank appealed.

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At the time of Mr. Just's death, certificates of stock Nos. 3, 4, 5, and 6 were in his custody, but all stood in the name of Ella V. Just upon the stock ledger of the bank, the entry being in Mr. Just's writing. Certificate No. 1 was assigned to Mrs. Just in Mr. Just's handwriting. The assignments upon the back of the others were signed by Mr. Just, but the blanks were not filled. Nos. 8 and 9 were held by the Belding Bank, and claimed as collateral to a note of $1,950, signed by Mr. Just, and dated January 12, 1898, on four months' time. Nos. 2 and 7 were held by the State Savings Bank of Ionia as collateral to Mr. Just's note of $2,000, given December 2, 1897, on four months' time. All of this stock appears by the stock ledger to have been transferred to Mrs. Just on December 17, 1896, except No. 1, which bears the date of February 15, 1897. It was conceded that certificate No. 1 was the property of Mrs. Just, and that it was delivered to her. It was also admitted that certificate No. 6 was taken up, and a new certificate for $800 issued to Mrs. Smith, who was entitled to it. This leaves $200 of No. 6 in dispute, also certificates Nos. 2, 3, 4, 5, 7, 8, and 9, each representing $1,000 in stock. The Belding Bank claimed the right to certificates 8 and 9 as collateral security for its loan. A similar claim was made by the State Savings Bank as to Nos. 2 and 7, while the Ionia County Savings Bank claims a lien upon all except $800 of No. 6. The administrators deny that either bank has a lien upon the stock, and claim it for distribution generally among Just's creditors. The decree appealed from sustains the respective liens of the Belding and State Savings Banks as to 2, 7, 8, and 9, and of the Ionia County Savings Bank as to all except No. 1 and $800 of No. 6, subject to the claim of the Belding and State Banks on 2, 7, 8, and 9. It determines that the stock, with the exception of certificate No. 1, was never the property of Mrs. Just.

The intestate was in debt to the Ionia County Savings Bank in a large sum, and much of it was due. Under the statute (section 6098, 2 Comp. Laws) the bank had a lien

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upon this stock for such as was due, and under its by-law it had a lien whether the indebtedness was due or not. At this juncture Mr. Just was offered the office of State Bank Commissioner, whereupon he arranged with the officers of the bank and his wife that he should assign his stock to her, and that she should give the bank her note, indorsed by him, for $7,300, in reduction of Just's indebtedness, and it is claimed that it was agreed that the bank was to have a lien on the stock for the same. He accordingly assigned the stock in blank, and entered a transfer of it to his wife in the stockbook, she gave her note to the bank, he ceased to be an officer of the bank, and she was elected director, and qualified. It is contended by complainants' counsel that this transaction was merely colorable, and that he never delivered the certificates to his wife or the bank, and never had new certificates issued. Many other circumstances are suggested in support of this theory, upon which complainants contend that the stock at all times remained the property of Just, though they take the somewhat inconsistent position that there was enough to the transaction to divest the bank of its lien for Mr. Just's indebtedness remaining due and unpaid.

We are of the opinion that none of the three parties can be heard to say that this transaction was void. It was necessary for Mr. Just to part with his stock to render him eligible to the office of commissioner. He caused it to be transferred to his wife, who consented to receive it, and become a director. The bank also consented, and recognized her as such director. She cannot now repudiate her note, and her husband's administrators cannot claim the stock. Neither can the bank deny its transfer, or claim a lien based upon such denial. Had new certificates been issued to the wife, there could be no doubt of this. As it was, she became the owner of the stock, whoever held the certificates, and, as between the three parties, the Ionia County Bank had a lien upon them for her debt. If it be said that the by-law 19, forbidding the transfer without the consent of the board of directors,

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invalidates the transfer, it is a sufficient reply to say that this transfer must have been known and approved by the board. It recognized Mrs. Just as a stockholder by electing her a director, and apparently has never questioned the validity of the transfer. The general creditors were not injured by the transaction, and the bill, having apparently been filed under the statute (3 Comp. Laws, § 9363), is not sustained by the proofs, and was properly dismissed.

It remains, however, to determine the rights of the respective banks. The Ionia County Bank appeals from so much of the decree as postpones its lien to those of the Belding and State Savings Banks, and excludes certificate No. 1. We must, therefore, determine whether the alleged liens of these banks can be sustained, and whether the lien of the Ionia Bank should not cover certificate No. 1. As we have already said that the stock passed to Mrs. Just, and that her note is a valid obligation, certificate No. 1, to which no one questions her right, is subject to the lien of the Ionia County Savings Bank.

The State Savings Bank received two certificates of stock—8 and 9—on November 29, 1895, to secure a note of $2,000, which Mr. Just gave that day. In September, 1897, the Belding Bank advanced money to Mr. Just to pay this loan, taking the stock as collateral to a note given by him for that amount upon the assurance that it was with Mrs. Just's consent. It is claimed that on December 2, 1897, Mr. Just borrowed of the State Savings Bank $2,000, and gave, with the consent of Mrs. Just, certificates 2 and 7 as collateral security. This consent was in writing, and was addressed to the cashier of the State Savings Bank. At the time these certificates were delivered to the respective banks, Mrs. Just's only indebtedness to the Ionia County Bank consisted of a note for $7,658.10, dated July 26, 1897, due in one year from its date. This was executed and delivered September 12, 1897. The bank had no lien on her stock, under the statute, after September 12, 1897; but the agreement made at the time the stock was transferred was in force, and also

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the by-law which prohibits any transfer of stock without the consent of the board of directors, where the registered holder is indebted to the bank. There is nothing to indicate that the two banks knew of the by-law, or of the alleged agreement that the Ionia County Bank should have a lien on the stock. They received the certificates assigned in blank on the understanding that Mrs. Just was the owner, and the stock register shows that she was the owner. If they were *bona fide* holders for value of this stock, the by-law was not binding upon them, and neither was the agreement. See *Bronson Electric Co.* v. *Rheubottom*, 122 Mich. 608 (81 N. W. 563).

We find no evidence in the record that warrants us in holding that Mrs. Just authorized her husband to pledge her stock to the Belding Bank. Mr. Just's statement that he was authorized to do so does not tend to prove it. It follows that such pledge did not bind her, and the bank has no title to the stock. This leaves the Ionia Bank lien valid, and first upon the stock held by the Belding Bank.

With the State Savings Bank the case is different. It accepted the paper of Mr. Just on the faith of Mrs. Just's written consent, addressed to its cashier, that "Mr. Just was authorized to pledge 20 shares of stock with him for a loan." While a married woman may not become a surety for her husband, and thereby incur a personal obligation, she may pledge her property to secure his debt. This she seems to have been willing to do, and is now estopped from disputing the validity of the pledge. At the time this pledge was made, the Ionia Bank had no statutory lien upon this stock, and the State Bank was ignorant of the by-law and the alleged agreement. Before her note became due to the Ionia Bank, that bank had notice that the State Bank held the stock as security.

It is contended, however, that this did not make the State Bank the holder of a prior lien, for the reasons (1) that it had not the legal title to the stock; (2) that it failed to demand a transfer of the stock upon the bank books. The assignment of the stock in blank, and delivery, was

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sufficient, with the letter showing authority, to confer upon the State Bank an interest by way of security, which took precedence over any claim that the Ionia Bank then had, provided the State Bank was a *bona fide* holder for value. See 23 Am. & Eng. Enc. Law, 655, 656, and notes; *In re Argus Printing Co.*, 12 L. R. A. 781, and note (s. c. 1 N. Dak. 434, 48 N. W. 347, 26 Am. St. Rep. 639); 2 Morse, Banks, § 699 (*d*); *Gemmell* v. *Davis*, 75 Md. 552 (23 Atl. 1034, 32 Am. St. Rep. 412); *Nesmith* v. *Bank*, 6 Pick. 324; *Conant* v. *Reed*, 1 Ohio St. 298; *Prince Investment Co.* v. *Land Co.*, 68 Minn. 121 (70 N. W. 1079); *Des Moines Loan & Trust Co.* v. *Des Moines Nat. Bank*, 97 Iowa, 668 (66 N. W. 914); 1 Cook, Stock, Stockh. & Corp. Law, § 532.

Whatever may be the English rule, we think it is settled that the courts of this country repudiate the idea that a *bona fide* purchaser or pledgee of stock takes it subject to claims that may subsequently arise in favor of the corporation, if it has notice of his purchase, and that notice of the purchaser's rights is sufficient to protect them, although a demand for a transfer of the stock on the books of the corporation be not made. *Prince Investment Co.* v. *Land Co.*, 68 Minn. 121 (70 N. W. 1079); *Conant* v. *Reed*, 1 Ohio St. 298; *Bank of America* v. *McNeil*, 73 Ky. 54; *Des Moines Loan & Trust Co.* v. *Des Moines Nat. Bank*, 97 Iowa, 668 (66 N. W. 914); *Hotchkiss & Upson Co.* v. *Bank*, 15 C. C. A. 264, 68 Fed. 76; Cook, Stock, Stockh. & Corp. Law, §§ 532, 727. See, also, *Michigan Trust Co.* v. *State Bank of Michigan*, 111 Mich. 310 (69 N. W. 645); *Oakland County Sav. Bank* v. *State Bank of Carson City*, 113 Mich. 284 (71 N. W. 453, 67 Am. St. Rep. 463). While the State Bank was bound to know that it took the bank stock subject to any existing statutory lien in favor of the Ionia Bank, it could not be required to anticipate an agreement that this stock should be security for Mrs. Just's note, when the stock itself was not held by the bank; nor was it bound to know of the alleged by-law, or to inquire about it. The stock

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was transferred to Mrs. Just, and her agent produced the certificates with authority to pledge them. See *Bronson Electric Co.* v. *Rheubottom*, 122 Mich. 612 (81 N. W. 563); 1 Cook, Stock, Stockh. & Corp. Law, § 524, and cases cited.

Was the State Bank a *bona fide* holder for value? All the elements of such a holder are present, unless it be for the reason that it took security for a pre-existing debt, and did not pay money at the time it took the security. The fact is that an extension of time was granted, and a new note taken, in consideration of the pledge of this security. It has been the understanding of this court that such extension constituted a pledgee a *bona fide* holder for value, the other essentials not being lacking. It was so stated in the opinion of Mr. Justice MONTGOMERY in the case of *Schloss* v. *Feltus*, 103 Mich. 533 (61 N. W. 797, 36 L. R. A. 161), and recognized in the majority opinion in that case. See, also, *Thompson* v. *Village of Mecosta*, 127 Mich. 529 (86 N. W. 1044); 16 Am. & Eng. Enc. Law, 837, and note; *Cary* v. *White*, 52 N. Y. 138.

The decree must be modified, and it is adjudged that the Ionia County Savings Bank has a valid claim for the unpaid balance due upon the note of Mrs. Just, and that it has a first and unimpaired lien upon the stock belonging to Mrs. Just, viz., certificates 1, 3, 4, 5, 8, 9, and $200 of said certificate 6, and a lien upon certificates 2 and 7, subject to the lien of the State Savings Bank; that the State Savings Bank has a first and unimpaired lien on said certificates Nos. 2 and 7 for the amount due upon the note; that the Belding Bank has no valid lien upon any of said stock; that the complainants have no rights in any of said stock, and that their bill be dismissed. The Ionia County Savings Bank shall recover costs of both courts against the complainants, and the State Savings Bank shall recover its costs of both courts against the complainants and the Ionia County Savings Bank. No costs shall be recovered by or against any other party to said suit. In other re-

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spects the decree is affirmed, except as inconsistent herewith. The amounts remaining due upon the several obligations covered by said liens will be settled in the decree.

MOORE, GRANT, and MONTGOMERY, JJ., concurred.

BOOTH *v.* MURDOCK.[1]

SPECIFIC PERFORMANCE—INVENTION—WANT OF EQUITY.

Complainants contracted with a person to invent and patent a machine for them. Although the money was furnished according to the contract, it proved insufficient, and the work was stopped. Subsequently the inventor made an agreement with one having no knowledge of complainants' contract, to furnish money to complete the invention for an interest in it. The inventor died, and complainants filed a bill for specific performance. *Held*, that it would be inequitable to enforce the contract, especially against the defendant who had furnished large sums to complete the invention.

Appeal from Wayne; Frazer, J. Submitted October 15, 1902. (Docket No. 60.) Decided April 7, 1903.

Bill by Clarence H. Booth and Walter E. Booth against Charles A. Murdock, Austin E. Wing, administrator of the estate of Charles F. Murdock, deceased, and Eugene H. Sloman, for the specific performance of a contract. From a decree dismissing the bill, complainants appeal. Affirmed.

Charles C. Stewart (*Moore & Moore*, of counsel), for complainants.

E. T. Berger, for defendant Murdock.

Walker & Spalding, for defendant Wing.

Adolph Sloman, for defendant Sloman.

[1] Rehearing denied September 22, 1903.

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HOOKER, C. J. Complainants ask specific performance of a contract whereby Charles F. Murdock, now deceased, agreed to invent a machine for the pressing of bath tubs from sheets of steel, and after constructing a small model of such machine, and demonstrating its ability to produce the bath tub in miniature, to construct upon complainants' premises working machines of sufficient size to produce a merchantable bath tub of the description mentioned, and capacity for 20 tubs per day. In consideration of the above, complainants promised to pay $5,000 as follows, viz.: $200 during the construction of model machines, and additional money as might be required for labor and material in constructing the large machines, to the amount of $1,500; the balance to be paid when the machines should be erected on complainants' premises, and a merchantable tub produced. It was further agreed that, "upon completion of the above," Murdock should assist complainants to procure "patents covering all new and useful features brought into use by the construction of said machines, and the products thereof, and assign all his rights and titles therein" to the complainants.

The model was constructed, and miniature tubs were produced by it, some being perfect and some imperfect. Work was commenced on a large machine, and continued for a time, but was finally suspended by reason of Murdock's want of funds to go on with it. Complainants were during this time stockholders in a concern known as the Steel Bath Tub Company, and they assigned to it an interest in the contract with Murdock. They also paid Murdock from time to time, in accordance with said contract, by giving to him the checks of the Steel Bath Tub Company, until they had paid all except the final payment therein provided for. The Steel Bath Tub Company finally failed, about the time work was suspended by Murdock; and it is perhaps a proper inference that he stopped work when he was no longer able to procure money from the complainants, notwithstanding the fact that they had paid all that he was entitled to. The inter-

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est of the Steel Bath Tub Company was finally sold for a small sum to some one not a party to this proceeding, and Murdock mortgaged the machines to a bank.

Work was suspended on the machines for a year or more, until finally Sloman and Murdock made an arrangement whereby the former agreed to furnish money to complete the machine for a half interest in the invention and machines. A contract was also made between Sloman and the Murdock Valve Company, which claimed to own the machines in process of construction. Sloman afterwards invested upwards of $10,000 in attempts to complete the machine, more than $4,000 of which was paid before he had any notice of complainants' connection with the matter. Charles F. Murdock died a few months after Sloman became interested, and this bill was filed against his son, Charles A. Murdock, Wing, the administrator of Charles F. Murdock, and Sloman. It prays an injunction to restrain the disposition of the property during the litigation, and a decree that Wing, the administrator, be required to apply for a patent covering the invention, and assign the same to the complainants, and, if Charles A. Murdock be found to be a joint inventor, as claimed by him, that he be required to join therein, and that all defendants be required "to assign to the complainants their joint or several interests in and to any patent that they have heretofore or may hereafter apply for." In other words, it is a bill for specific performance, as already said.

It is unnecessary to discuss the evidence at length. We think it justifies the conclusion that the complainants made all payments required by the contract, and that a machine embodying certain principles was thought out, and drawings thereof made. A model of the machine was produced, which made the miniature tub, and the basic principles of the larger machine, which was begun before Murdock's death, were incorporated in the model machine. The large machine was not built at the time Murdock died, if it has been since, and no machine has ever been erected upon complainants' premises. Granting that

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the machine was invented, it is manifest that much work and many and repeated changes and alterations were necessary before it could be made to do the contemplated work. This was true when Murdock died, and, if the machine can now be said to have been perfected, it has been done by others at the expense of Sloman. But it is claimed that the machine is not now perfected, that the estate of Murdock is insolvent, and that much skilled labor will be required to devise and make alterations, and to perfect and build the machines provided for by the contract. Furthermore, there is evidence tending to show that Charles A. Murdock is a joint inventor with his father, and therefore an owner of an interest in the invention, while, as already said, one not a party to the record owns a substantial interest in the contract under an assignment from the complainants.

We need not pass upon the many legal questions discussed. If it were to be conceded that there is no legal impediment, it would be inequitable to make such a decree as is asked for, especially against Sloman. A court of equity will not usually decree specific performance where justice cannot be done to all parties.

The decree of the circuit court is affirmed, with costs, but without prejudice to any other remedy that complainants may have against Murdock's estate upon the contract.

MOORE, GRANT, and MONTGOMERY, JJ., concurred.

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HOPKINS *v.* CROSSLEY.[1]

TRUSTS—PERSONAL PROPERTY—CHARITABLE USES.

An incorporated volunteer fire department, preparatory to a dissolution, and after disposing of a portion of its property, converted the balance into money, and placed it in the hands of trustees, the income therefrom to be applied by them to the relief of poor and needy members of the corporation and their families, to the relief of any poor, needy, or disabled members of the present or future fire department, and to the relief of any other needy and worthy persons who might be designated from time to time by the trustees. *Held*, that the doctrine of charitable uses does not exist in this State, and the trust should be held void.

Appeal from Wayne; Hosmer, J. Submitted October 17, 1902. (Docket No. 80.) Decided April 7, 1903.

Bill by Robert Hopkins and others against Luke Crossley and others to set aside a trust. From a decree dismissing the bill, complainants appeal. Reversed.

John J. Speed and *Robert T. Speed*, for complainants.

Fred A. Baker, for defendants.

HOOKER, C. J. The members of the old volunteer fire department of Detroit were incorporated in 1840 by special act of the legislature, and given the right of perpetual succession. Laws 1840, Act No. 14. Section 6 of the act provided that "the interest arising from the funds of the said corporation, except sufficient to defray incidental expenses, shall be appropriated to the relief of such indigent and disabled firemen and their families who may be interested in the fund, and who may, in the opinion of the majority of the trustees, be worthy of assistance." This section was amended in 1869 to read as follows, viz.:

[1] Rehearing denied September 22, 1903.

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"That the funds of the said corporation, and the interest thereon, shall be appropriated and used in carrying out the objects and purposes of said corporation, defraying its incidental expenses, providing for the relief of indigent and disabled members of the corporation, their widows and orphans, as well as for the maintenance of an institution or institutions for moral and intellectual improvement, and the relief and instruction of such homeless and destitute persons of the city of Detroit as they may select, and for no other purpose whatever." 3 Laws 1869, Act No. 440.

The volunteer fire department was abolished by the organization of a paid department in 1867. 2 Laws 1867, Act No. 453, § 2. The corporate organization of the old department was maintained until 1886. Shortly before that time a meeting was held, at which 80 of a total of 116 members were present, and, after hearing the report of a committee appointed by the meeting, said report was adopted by a unanimous vote of the 80 present. The substance of the report was as follows: It recommended:

1. That the property be converted into money, with the exception of certain paintings, which should be turned over to the Art Museum, in trust, and, if that should cease to exist, then to be delivered to the Public Library.
2. That $58,500, or so much of said sum as should be necessary for the purpose, should be used to pay each one of the existing members of the corporation the sum of $500.
3. That $15,000 should be used in purchasing a bed in perpetuity in each of several hospitals of the city, naming them, to be devoted to specified uses.
4. That the balance of the fund should be placed in the hands of three trustees, to be named by the corporate board, as a *trust of personal property only*, and that the income to be derived from such fund should be applied by them "to the relief of poor and needy or disabled members of this corporation and their families, so long as any of them live; that, *secondly*, said income shall be applied to the relief of any poor, needy, or disabled members of the present active, or any future, fire department of the city of Detroit; that, *thirdly*, said income shall be applied to the relief of any other needy and worthy persons who may be designated from time to time by the trustees hereinafter

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mentioned; that said trustees may also use, in their discretion, a portion of the income, from time to time, in keeping the lots and monuments erected in the cemeteries of Detroit in honor of the firemen of said city in repair; that whenever the trustees, in purchasing a bond or security, shall pay a premium therefor, they shall retain out of the interest such sums annually as will restore to the fund at the maturity of the bonds or security exactly what was taken therefrom at the time of the purchase; and that said trustees are also charged with the duty of looking after the beds in said hospitals, to the end that they be devoted to the uses and purposes for which they were purchased." Provision was made for the appointment of trustees to fill such vacancies as should occur.

5. That, when the foregoing plan should be carried out, proceedings be taken for the voluntary dissolution of the corporation.

Accordingly the proper officers executed an indenture to three persons, named as trustees, reciting the proceedings mentioned above, and the proceedings of the corporation and board thereafter taken to carry out said report so adopted, and that the property had been converted into money, and $500 paid to each member, the delivery of the paintings as provided, the purchase of the beds as directed, the selection of trustees and their acceptance, and thereby conveyed the remaining property, amounting to $20,000, to said trustees. This writing was executed in 1887, and its provisions have been carried out since. The corporation was duly dissolved thereafter. The bill in this cause was filed by 24 of 48 survivors of the members of the defunct corporation for the purpose of having the trust declared void. They pray that the trustees be required to distribute the funds, principal and interest, among the surviving members of the corporation. The trustees answered, and a hearing upon the merits was followed by a dismissal of the bill, with costs. The complainants have appealed.

It seems to be conceded that this trust can be sustained only upon the theory that it is a conveyance to charitable uses. Complainants contend that the doctrine of charit-

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able uses does not exist in this State, while defendants insist that it does so far as to cover conveyances of personal property for charitable uses, though they admit that it does not as to real estate. It is a significant fact that no case has been called to our attention in which the doctrine has been enforced, either as to real or personal property. The case of *Methodist Episcopal Church* v. *Clark*, 41 Mich. 741 (3 N. W. 207), discussed the question, and it was then pointedly said by Mr. Justice COOLEY that the statute of Elizabeth was repealed in 1810, and that "there is no evidence that any pre-existing law on that subject has ever been recognized in this State." Counsel for the defendants says that this language was not necessary to a decision of the case, for the reason that the statute against perpetuities was sufficient to require the disposition made of that case, and that what was said about charities was *dictum*. Assuming this as a premise, he proceeds to argue that this trust can be maintained because of the absence of a statute restraining alienation of personal property, in which respect Michigan statutes differ from those of New York, from which fact he urges a distinction between the law declared in New York and the rule which he invokes to govern this case.

If it can be said that the only obstacle in the way of upholding the trust is the statute against perpetuities, his contention might be sustained. Again, the statute of uses and trusts (chapter 238, 3 Comp. Laws 1897) does not affect the question, for it affects real property only. *Ledyard's Appeal*, 51 Mich. 623 (17 N. W. 208). We find it necessary, therefore, to ascertain whether the case of *Methodist Episcopal Church* v. *Clark*, *supra*, is controlling. In that case a landowner conveyed to trustees certain lands, "in trust that they shall erect and build * * * a church for the use of the members of the Methodist Episcopal Church, * * * and in further trust and confidence that they shall at all times forever hereafter permit such ministers * * * to preach therein," etc. The court first discussed the case upon the assump-

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tion that the trust was for the exclusive benefit of the local society, and upon that theory held that the trust was void, as conflicting with the principle of the general statute against perpetuities. 2 Comp. Laws 1871, § 4082. If a private trust, as assumed, this would doubtless be true. We now come to what is said to be a *dictum*. The court seems to have considered it necessary to go further. It did not leave the decision to rest upon the assumption that this was a private charity, for, as was said, the terms of the trust were somewhat ambiguous, and the deed was open to an interpretation which would preclude any exclusive appropriation by the local society. While the court did not decide that this was a public charity, it may be thought to have intimated that it might be, and called attention to a case where a similar trust was discussed. See *Methodist Society* v. *Bennett*, 39 Conn. 293. If, as defendants' counsel has chosen to admit, the statute against perpetuities in relation to real property is applicable to lands conveyed to charitable uses, as it was held to be to lands conveyed to a private trust or use, this might easily have been said, and more would have been unnecessary; but the court did go further, as already said, and, if it was necessary to do so, to dispose of this feature of the case before it, what *was* said was more than a *dictum*. Evidently the court thought it necessary, and it can hardly be said to have supposed that what it said was *obiter*.

We will, however, examine the question further. Counsel's seeming concession that the statute against perpetuities in land applies to land conveyed to charitable uses may not correctly state the law. On the contrary, it has been held in many cases, if it is not the uniform doctrine, that "the rule against perpetuities does not apply to a gift to a charity." See a discussion of this subject in Perry, Trusts, § 384, and section 736 *et seq.*, and notes, where the distinction between charities and trusts (proper) is drawn. See, also, the text and authorities cited in 5 Am. & Eng. Enc. Law (2d Ed.), at page 902. It is sig-

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nificantly said in a note to the last citation that while provisions against perpetuities are found in several States, among which is Michigan, the validity of charitable trusts has not been attacked on that ground. This is true of the opinion in *Methodist Episcopal Church* v. *Clark*. We see from the foregoing that the court might readily have believed, as we think it did, that its decision could not be left to rest on the statute prohibiting perpetuities, if it was to call the trust a charitable one. It understood that the statute was no answer to such a claim, and it went on to say:

"If the law of charitable uses were in force in this State, the trust might be upheld under its rules. But that law is generally referred to as the 'Statute of Elizabeth,' commonly called the 'Statute of Charitable Uses,' which, with other English statutes, was repealed in Michigan in 1810. 1 Terr. Laws, 900. There is no evidence that any pre-existing law on that subject has ever been recognized in this State."

See, also, *Hathaway* v. *Village of New Baltimore*, 48 Mich. 254 (12 N. W. 186); *Harrington* v. *Pier*, 105 Wis. 485 (82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924); *Bascom* v. *Albertson*, 34 N. Y. 584; *Holmes* v. *Mead*, 52 N. Y. 332; *Ruth* v. *Oberbrunner*, 40 Wis. 238.

We are convinced that the rule laid down is not a *dictum*, and that the question was settled in that case. It is urged that this holding was wrong, and that the court of chancery, having the powers of the English court of chancery, has a jurisdiction over charities independent of the statute of charitable uses,—one whose origin antedated such statute. It must be admitted that many authorities sustain this contention, but to adopt it we must overrule authorities in this State of long standing, which have been followed by the profession and the courts. The conflict among the decisions of other States indicates that the doctrine contended for may be of questionable policy, and, if it is not, a remedy can readily be applied. We have felt reluctant to hold invalid this charitable trust,

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which seems a meritorious one, but we see no escape from that responsibility.

The first, second, and third prayers of the bill will be granted, and it is further decreed that the trustees distribute, under the direction of the circuit court, among the persons who shall be shown to be entitled thereto, the fund in their possession. No costs will be allowed.

MOORE, GRANT, and MONTGOMERY, JJ., concurred.

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MULL *v.* SMITH.

1. STATUTE OF FRAUDS—SALE OF LANDS—MUTUALITY OF CONTRACT.

   Under the statute of frauds, making contracts for the sale of lands void unless the contract, or some note or memorandum thereof, is in writing and signed by the vendor, a contract for the sale of land, a memorandum of which is signed by the vendor only, is valid and binding on both parties.

2. SAME—TERMS OF CONTRACT—EXISTING MORTGAGE.

   A memorandum of a contract for the sale of lands, stating that the owner agrees to give a warranty deed upon payment of $275, subject to a mortgage of $250, is not so deficient in failing to state the particular mortgage, and its terms, as to make the contract void under the statute of frauds.

3. SAME—TIME OF PAYMENT.

   An offer to sell land for $375 cash, which is accepted, and $100 paid, and a memorandum given by the vendor agreeing to give a deed upon payment of $275, is an agreement to pay cash within a reasonable time, and sufficiently fixes the time of payment to comply with the statute of frauds.

Error to Newaygo; Palmer, J. Submitted November 21, 1902. (Docket No. 118.) Decided April 7, 1903.

Assumpsit by Edwin M. Mull against Frank H. Smith

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for money had and received. From a judgment for defendant, plaintiff brings error. Affirmed.

Martin Rozema, for appellant.

A. F. Tibbitts, for appellee.

HOOKER, C. J. The plaintiff sued to recover $100 paid to the defendant. The cause was tried before the circuit judge without a jury, and he rendered a judgment for the defendant, and the findings filed show the following facts: The defendant owned a 40-acre tract of land, called the "Burns Farm," and negotiations were had between the parties for its purchase by the plaintiff. The premises were inspected by plaintiff and an agent of the defendant, who asked $650 for them. The agent was directed by the plaintiff to ascertain whether the defendant would take "less than $650 for cash." The parties met defendant, who, on being asked to fix his lowest cash price, submitted the following written proposition:

"FREMONT, MICH., December 22, 1900.

"Forty acres for $650. Mortgage $250. Leaves balance $400. Will take cash $375 for my interest in place.

"FRANK H. SMITH."

This was Exhibit 1. Plaintiff accepted this, and paid $100 down. Defendant gave him a memorandum of the contract, reading as follows:

"FREMONT, MICH., Dec. 22nd, 1900.

"I agree to give Mr. E. M. Mull a warranty deed of the Burns farm upon payment of $275, subject to mortgage of $250.

"FRANK H. SMITH."

This was Exhibit A. He also gave him the following receipt:

"$100.00. FREMONT, MICH., 12—22, 1900.

"Received of E. M. Mull one hundred dollars to apply on payment of Burns farm.

"F. H. SMITH."

This was Exhibit B. It was arranged that the plaintiff

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was to have a short time to go to Ohio to get money to pay the balance of the purchase price. Some time after, the defendant tendered a deed and demanded payment, which the plaintiff refused. The plaintiff's claim is that the contract was void under the statute of frauds, and that he was entitled to recover the money paid. The court held that Exhibits A, B, and 1 constituted a valid contract, and that plaintiff could not recover, and rendered judgment of no cause of action. Plaintiff has appealed.

Our statute does not make all contracts for the sale of land void. It excepts those where the contract itself, or some note or memorandum thereof, is in writing and signed by the *vendor*. When the contract itself is in writing and signed by both parties, the writing *is* the contract. When the memorandum of the oral contract is in writing and signed by the vendor, it is not the contract, but a memorandum, which makes it binding upon him if accepted by the vendee. This is valid evidence of the contract. But can it bind him if not binding upon the vendee? The statute differs from the English statute, which binds the one sought to be charged only when *he* has signed it. Under such a statute it may be doubtful if, relying solely upon the memorandum signed by himself, the vendor could enforce, or recover damages for the breach of, the contract. See note to *Seton* v. *Slade*, 2 White & T. Lead. Cas. Eq. 1091 *et seq.* But, whether this is so or not, we cannot doubt that, before either party can make the contract the basis of a suit or action, the element of mutuality must be discernible. See *Wilkinson* v. *Heavenrich*, 58 Mich. 574 (26 N. W. 139, 55 Am. Rep. 708). And if we admit as satisfactory the reason given, *i. e.*, that by filing a bill the vendee has made the remedy mutual, or say that, by the statute itself, it is made binding upon the vendor, what shall we say when an action is brought against the vendee, or he sets up a defense based upon the statute, in the absence of any proof except a memorandum made, signed, and produced by the vendor only? Manifestly, we should require proof that the vendee had something to do with the

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contract, and this is supplied in this case by evidence that he accepted the memorandum as such, and paid money upon it, as in the case of personal property. 1 Mechem, Sales, § 450. See 8 Am. & Eng. Enc. Law, 719, and note 2. It being admitted that the vendor has made and the vendee accepted such a memorandum, it must, in the absence of fraud, be taken as conclusive, not subject to variation by parol evidence, and, if it contains all of the requisites of a valid land contract, it is binding on both; otherwise not. See 1 Mechem, Sales, § 446, and note.

The circumstances under which these writings were executed and given are said to be admissible in aid of their construction. 8 Am. & Eng. Enc. Law, 722, and note 2. We are of the opinion that the two writings which were delivered to and kept by the plaintiff show plainly enough all of the essentials of a land contract. The plaintiff claims that they are deficient because they fail to state the particular mortgage, and its terms, subject to which the plaintiff purchased. We are satisfied that a promise to give a warranty deed, subject to a mortgage of $250, would ordinarily be understood to mean an existing mortgage. That would be the ordinary meaning of the language. See 1 Comp. Laws, § 50.

Again, it is said that the *memoranda* fail to show when the purchase price should be paid, and counsel seems to have thought it competent to show that in fact the agreement was for a deferred payment at a definite time. We have already said that, by accepting the writings as such memorandum, plaintiff has cut off any right to question their accuracy, and the only question left to him is whether they sufficiently contain the terms of the agreement. We think they do. The only inference is that he shall pay cash for the property within a reasonable time. See Browne, Stat. Frauds, § 384.

Here, then, was a valid contract for the sale of land. Defendant is proven to have made it by his writings signed and delivered. The plaintiff is shown to be a party to it by oral proof of his acceptance of defendant's *memoranda*,

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and payment of $100 upon it. He cannot recover the $100 as money paid for his use.

The judgment is affirmed.

The other Justices concurred.

PURDY *v.* LAW.

1. JUSTICES' COURTS—JURISDICTION—APPEARANCE.
   Where the entries in a justice's docket show that a summons was issued, but not served on one of the defendants, and an *alias* was issued, but no entry of the appearance of the plaintiff on the return day, and no entry of the appearance of the defendants, a judgment rendered against them on the return day of the *alias* summons is void.

2. SAME—ALIAS SUMMONS—DATE OF ISSUE.
   Such judgment cannot be sustained by considering the *alias* summons as the commencement of another action, where the docket fails to state when it was issued.

Appeal from St. Clair; Tucker, J., presiding. Submitted December 4, 1902. (Docket No. 145.) Decided April 7, 1903.

Bill by Delos Purdy against Eugene F. Law to remove a cloud from title. From a decree dismissing the bill, complainant appeals. Reversed.

William E. Leonard (*William T. Mitchell*, of counsel), for complainant.

Alex. Moore, for defendant.

HOOKER, C. J. The complainant filed the bill in this cause to remove a cloud from his title to a lot in Port Huron. The testimony shows that he purchased the lot from George E. Mallory for a valuable consideration, and

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in ignorance of any claim against it, although at the time of such purchase the defendant had a sheriff's deed of the premises issued upon an execution sale based on a transcript judgment.

The transcript of the docket filed is as follows:

"NEIL MCCORMICK
"*vs.*
"ELMER G. MALLORY and GEORGE E. MALLORY.

Attorney: JOHN L. WILLOUGHBY.
Assumpsit.

"Sept. 28th, 1898, *præcipe* filed and summons issued, returnable at my office in the city of Port Huron on October 6th, 1898, at 8 a. m.

"Summons returned personally served on Elmer G. Mallory, one of said defendants, on September 28, 1898, by Alex. T. Stewart, constable. Summons not served on George E. Mallory, one of said defendants, and *alias* issued, returnable at my office in the city of Port Huron on October 12th, 1898, at 8 o'clock a. m. Summons returned personally served on George Mallory, one of said defendants, on October 6th, 1898, by Alex. T. Stewart, constable. Fees, 45 cents.

"October 12th, 1898, at 9 a. m., case called. Plaintiff present by John L. Willoughby, who proves his authority to appear under oath. Defendants not present, nor either of them. After waiting one hour and defendants not appearing, plaintiff declares orally on common counts in *assumpsit*, and especially on a certain promissory note, which is herewith filed as part of declaration, and claims damages $300.00 or under. John L. Willoughby sworn for plaintiff (for testimony see justice's note book). Thereupon, after hearing all the evidence, the court rendered judgment in favor of the plaintiff and against the defendants for twenty-one dollars and twenty cents damages and $2.55 costs.

"CARL A. WAGNER,
"Justice of the Peace.

"Dated October 12, 1898.
"Damages, $21.20; costs, $2.55."

The defects in this transcript which are relied upon are:

1. That it fails to show that the plaintiff appeared upon the return day of the summons, or requested that an *alias* summons be issued, and that, therefore, the court lost jurisdiction, and the subsequent proceedings were void.

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2. That the docket fails to show an appearance by the plaintiff on October 12th within the hour, and that, if the court had jurisdiction to issue the *alias*, it was lost by his failure to call the case and plaintiff's failure to appear before 9 o'clock.

According to the record, George E. Mallory was not served with the original summons, but was served with the *alias*. The police court being a court of limited jurisdiction, its jurisdiction must affirmatively appear upon the record, or the judgment may be treated as void. The plaintiff is not shown to have appeared upon the return day, and, as the statute (1 Comp. Laws, § 957) requires that the time of the appearance of the parties be entered, we must assume that no one appeared upon the return day, and the failure of the plaintiff to appear worked a discontinuance of the case, and ousted the court of jurisdiction. See *Redman* v. *White*, 25 Mich. 526; *Brady* v. *Taber*, 29 Mich. 200,—where it was held that a failure of the plaintiff to appear ousts a justice of all jurisdiction; *Johnson* v. *Dexter*, 38 Mich. 695. In *Mudge* v. *Yaples*, 58 Mich. 307 (25 N. W. 297), it was held that the docket must show affirmatively that the plaintiff appeared on the return day of the summons within one hour of the time fixed therein, and that otherwise the judgment is void, and that oral evidence is inadmissible to show jurisdiction in such a case. *Post* v. *Harper*, 61 Mich. 434 (28 N. W. 161).

It is contended that the *alias* summons may be treated as the commencement of another action. The transcript states that this *alias* summons was made returnable on October 12th at 8 a. m., but fails to state when it was issued. The law requires the docket to show the time when the first and subsequent process was issued, and the particular process issued. 1 Comp. Laws, § 957. There is no way of telling from the docket when it issued, and it negatives the claim that it was original process.

The action was brought before a police justice of Port Huron, whose jurisdiction is fixed by the charter. See

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Act No. 445, Local Acts 1897, chap. 14. Section 16 provides that, "before any civil action or proceeding * * * shall be commenced in said justice's court, there shall be filed * * * a *præcipe* for the writ desired, and * * * at the same time the sum of one dollar shall be paid to the clerk." Whether the filing of said *præcipe* or payment of said fee should be held jurisdictional need not be discussed, for the case must be disposed of on other grounds. If this summons is to be treated as an *alias* summons, it is void, for the reason that the suit abated by the failure of the plaintiff to appear on the return day and demand it. If it might be treated as an original summons in contravention of the docket, the judgment is still void upon its face, because it omits to comply with the statutory requirement as to the entry of the time when the process was issued. This is more than an irregularity. It renders the judgment of the magistrate void, and, the defect appearing upon the face of the transcript judgment, advantage may be taken of it in this proceeding. The sheriff's deed is a cloud upon complainant's title, and he is entitled to have it removed.

The decree is reversed, and a decree will be entered in this court in accordance with the prayer of the bill, with costs of both courts.

The other Justices concurred.

CLEVELAND v. ROTHSCHILD.

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1. PLEADING—ASSUMPSIT—GENERAL ISSUE—RELEASE.
   Evidence of a release, which was in effect a payment or satisfaction of plaintiff's claim, was admissible in an action of *assumpsit* under a plea of the general issue, filed before the adoption of Cir. Ct. Rule 7.

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2. TRIAL—EVIDENCE—QUESTION FOR JURY.

Where defendant's testimony tended to establish a release, and plaintiff's that the arrangement was not concluded and the release never delivered, the question was one of fact for the jury.

Error to Wayne; Brooke, J. Submitted January 6, 1903. (Docket No. 5.) Decided April 7, 1903.

Assumpsit by William H. Cleveland against Sigmund Rothschild to recover the purchase price of certain corporate stock. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Tarsney & Fitzpatrick, for appellant.

Chamberlain & Guise, for appellee.

HOOKER, C. J. Plaintiff brought this action of *assumpsit* to recover $5,000, which he claims to be his due from the defendant as the purchase price for an interest in a stone quarry sold by him to the defendant.

The defendant pleaded the general issue in 1896, and the following writings were offered and received in evidence:

"For certain valuable considerations granted me by Sigmund Rothschild, of the city of Detroit, I do hereby release said Rothschild from all personal obligation and liability in connection with the affairs of the Cleveland Stone Company of the city of Detroit.

"W. H. CLEVELAND.

"Dated Detroit, Feb. 28, 1894."

"For a valuable consideration to me in hand paid by W. H. Cleveland, of the city of Detroit, I do hereby agree to procure and deliver to said Cleveland from Charles Scheuer, of the city of New York, who, under judicial process of a court of the Dominion of Canada, and by virtue of a certain bill of sale executed by the Cleveland Stone Company of Detroit to said Charles Scheuer, is now in possession of the stone-crushing plant, property, and business of the said Cleveland Stone Company, an option or agreement, running until the 1st day of May next, for the

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sale and delivery to said W. H. Cleveland of the above-mentioned property and business, free from all indebtedness, upon the payment to me of the sum of fifteen thousand dollars in cash or approved paper, as said Cleveland may elect, said paper payable in one and two years from this date, with interest at 6 per cent. per annum.

"SIGMUND ROTHSCHILD.

"Dated Detroit, Feb. 28, 1894."

There was testimony tending to show that these papers were delivered on the day of their date. Defendant also introduced the following letter and telegram:

"DETROIT, March 5, 1894.

"SIGMUND ROTHSCHILD, Esq.,
"New York.

"*Dear Sir:* Went to your office this morning pursuant to your own appointment last evening, and was informed you had left on the 9:50 train for New York. Have just written you, care Hotel Savoy, that, as you impose another condition, in addition to those entered into between us, relating to the personal release of yourself from all personal obligation to myself in connection with our company affairs, and the securing of the option from Charles Scheuer for the sale and transfer of the property and business to me, viz., the withdrawal of the suit against Brown, that if you will wire Mr. Schott, or some other representative, to fix me for $1,500 for three or four months, I will withdraw said suit. And, if successful in disposing of the property,—negotiations to that end, however, must remain in abeyance until I hear from you,—this money with my debt at the house shall be provided for, and possibly enough more in some shape to cover your personal loss in our enterprise.

"I write this care of E. Rosenwald & Bro., in case the letter to care of Savoy fails to reach you promptly.

"Sincerely,
"W. H. CLEVELAND."

"Dated DETROIT, MICH. Received at 42 East 59th St.
"March 5, 1894.

"To SIGMUND ROTHSCHILD,
"Savoy Hotel:

"Will withdraw suit if wire fixing me fifteen (15) hundred four months to be returned. Letters mail.

"W. H. CLEVELAND."

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The plaintiff sought to show that the release relied on by defendant came to his (defendant's) hands during negotiations not completed, and was retained without right, and that there was in fact no delivery of the same. He also claimed that it was not admissible under the general issue, and that the court erred in directing a verdict for the defendant.

The most comprehensive question in the case is raised by plaintiff's claim that the defense of a release must be specially pleaded, and was not admissible under the general issue. Tiffany's Justice's Guide, at page 191, is authority for the proposition that, "under this plea, any matter which shows that the plaintiff never had a cause of action, and also most matters in discharge of the action, are admissible;" and in a note (1) a release is mentioned as one of these defenses, on the authority of 1 Chitty, Pl. 478 (9th Am. Ed.), and *Fulton Bank* v. *Stafford*, 2 Wend. 486, where there is a statement to the effect that, "in *assumpsit*, the defendant, under the general issue, may give in evidence anything which shows that the plaintiff, at the commencement of the suit, had not a good cause of action, or that nothing is due; as payment, a release, accord and satisfaction." The defense in that case was usury. Chitty admits that this is at variance with the rule that "a matter of defense which admits the facts stated in the declaration, but avoids them, should be specially pleaded." See 1 Chitty, Pl. 479. See, also, Id. 515, where it is said: "In every species of *assumpsit*, all matters in confession and avoidance shall be specially pleaded; *ex. gr.*, release, payment," etc.

This court has frequently held that the plea of the general issue in civil actions traverses every material averment in the declaration which must be proved, and seems to have recognized the rule that matters of avoidance should be pleaded specially. *Kinnie* v. *Owen*, 1 Mich. 249; *Ingalls* v. *Eaton*, 25 Mich. 32; *Rawson* v. *Finlay*, 27 Mich. 268; *Edwards* v. *Chandler*, 14 Mich. 471 (90 Am. Dec. 249); *Osborn* v. *Lovell*, 36 Mich. 250; *Wilson*

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v. *Wagar*, 26 Mich. 452; *Snyder* v. *Willey*, 33 Mich. 483; *Grieb* v. *Cole*, 60 Mich. 397 (27 N. W. 579, 1 Am. St. Rep. 533); *Dean* v. *Chapin*, 22 Mich. 275; *Hill* v. *Callaghan*, 31 Mich. 424; *Hovey* v. *Sebring*, 24 Mich. 232 (9 Am. Rep. 122); *Reynolds* v. *Kent*, 38 Mich. 246; *Child* v. *Manufacturing Co.*, 72 Mich. 623 (40 N. W. 916).

We have little doubt, however, that the rule as stated by Tiffany has been accepted by the profession generally as the rule in this State. It is settled that payment may be shown under a plea of the general issue. *Olcott* v. *Hanson*, 12 Mich. 454; *Burt* v. *Olcott*, 33 Mich. 179; *Huntoon* v. *Russell*, 41 Mich. 316 (2 N. W. 38); *Brennan* v. *Tietsort*, 49 Mich. 398 (13 N. W. 790).

On the other hand, the only cases brought to our notice where releases have been offered are those of *Rawlings* v. *Cole*, 67 Mich. 431 (35 N. W. 66), and *Field* v. *Plummer*, 75 Mich. 437 (42 N. W. 849). The first of these was an action against two signers of a note. Under a plea of the general issue, one sought to show that he was only a surety upon the note, and that "he was released from any liability on said note by reason of a contract made by plaintiff with his codefendant to extend the time of payment." It was held that the defense should have been specially pleaded. In the other case defendant was sued upon a judgment rendered in Illinois. Under a plea of the general issue he offered to show that he was a surety, and that, many years before, the plaintiffs had agreed not to enforce the judgment. It was held that this defense should have been pleaded.

It is a noticeable fact that in neither of these cases was there any claim of payment or performance of defendant's undertaking. In the present case defendant's release is apparently based upon a consideration, and was in effect a payment or satisfaction of the plaintiff's claim. Payments are not always made in money. Anything may be accepted as a payment. It is only necessary that the parties so agree. A horse given and accepted in full of this

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debt would have been a payment, and it could be shown under the general issue. Here there was an executory contract for an option, which, according to defendant's theory, was given and accepted as a satisfaction of the debt. We are of the opinion that this testimony was admissible under the original plea, which was filed in 1896, before the adoption of Cir. Ct. Rule 7. As both parties and the court seem to have acted upon the assumption that defendant's rights under the plea of the general issue were not changed in this case by the adoption of the rule, we do not discuss the question of its effect on pending litigation, or the addition, by way of amendment to such plea, of a notice of set-off.

Defendant's testimony tended to establish the release or payment. This the plaintiff denied, claiming that the arrangement was not concluded and that the release never was delivered. This raised a question of fact, and should have been submitted to the jury. We do not overlook the contention of defendant's counsel that letters written by the plaintiff after February 28th are inconsistent with this claim and disprove his oral testimony, but we think that these are matters that should have been left to the jury.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

AUDITOR GENERAL *v.* CHASE.

1. TAXES—SALE OF LANDS—OBJECTIONS—APPEAL.
   On an appeal from a decree directing the sale of lands for taxes, only such objections will be considered as were made on the hearing to enforce the tax.

2. PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS—INTENTION OF COUNCIL—APPROPRIATION BILL.
   Where a charter provision requires the common council, before

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levying a special assessment for an improvement costing more than $3,000, to set forth its intention in the preceding annual appropriation bill, the fact that an improvement costs more than was set forth in the appropriation bill does not render the tax void.

3. SAME—REPAVING—CHANGE OF GRADE.

Under a charter providing that, when a street shall have been graded and paved at the expense of the abutting property owners, such property owners shall not be liable to any special assessment occasioned by any subsequent change of grade in such pavement, unless such change is asked for by a majority of the lot owners, such property may be assessed for the expense of repaving without such request, though a slight change of grade is made, incidental to the kind of paving material used.

Appeal from Oakland; Smith, J. Submitted January 9, 1903. (Docket No. 28.) Decided April 7, 1903.

Petition by Perry F. Powers, auditor general, for the sale of land delinquent for taxes: On objections filed by Mary A. Chase. From a decree for petitioner, defendant appeals. Affirmed.

H. M. Zimmermann and *M. F. Lillis*, for petitioner.

Patterson & Patterson, for defendant.

MONTGOMERY, J. This is an appeal from a decree directing the sale of lands for taxes. The tax objected to was a tax imposed upon defendant's land for the paving of Saginaw street, in the city of Pontiac, in the year 1899. The objections set out in the pleadings are that the intention to make such pavement and expenditure was not set forth in the preceding annual appropriation bill; that no proper legal notice was given for a review of the special assessment; that the special assessments were not levied before the paving was commenced; that the change of grade and repaving of the street were not asked for by a majority of the owners of lots abutting on Saginaw street. These comprise the specific objections. In this court it is

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contended that the notice of the proposed pavement, and the district to be assessed, and of the time when the council would meet to hear objections, was insufficient. This is plainly not the objection stated in the pleadings. By section 13 of chapter 24, Act No. 215, Pub. Acts 1895, a notice is required of the meeting of the council and special assessors sitting as a board of review, which is the meeting referred to in the objection. No complaint appears to have been made as to the sufficiency of this notice. We have repeatedly held, of these proceedings, that only such objections as were made on the hearing to enforce the tax would be considered by this court. *Auditor General* v. *Maier*, 95 Mich. 127 (54 N. W. 640).

Section 16, chap. 30, Act No. 215, Pub. Acts 1895, as amended by Act No. 136, Pub. Acts 1899, provides that:

"No work or improvement to be paid by special assessment costing more than three thousand dollars shall be ordered commenced or contracted for, nor shall any assessment be levied therefor in any year, unless the intention to make such improvement or expenditure, and to defray the cost thereof by special assessment, was set forth in the last preceding annual appropriation bill: *Provided*, however, that this section shall not apply to any public improvement ordered by the council upon a petition of the owners of a majority of the lands liable to be assessed for the improvement."

In September, 1898, the annual appropriation bill did give notice of an intention to pave Saginaw street between Jackson street and Oakland avenue, at a cost estimated at $40,000. Subsequently the expense turned out to be some $70,000, of which the city assumed to pay something over $20,000, leaving nearly $50,000 to be raised by special assessment. It is contended that the council did not have jurisdiction to levy in excess of $40,000 in a special assessment for the purpose mentioned. We do not think this statute is susceptible of this construction. The fact that the council intended to enter upon the work is sufficiently set out in the annual appropriation bill, and the fact that it turned out later that the expense of the improve-

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ment was greater than was anticipated does not make it necessary for the city to wait another year before entering upon the contemplated work.

The meritorious question presented by the case is whether the levy is void because the improvement was not petitioned for by a majority of the property owners on Saginaw street. The village of Pontiac was incorporated in 1842, and continued as a village until 1861, when incorporated as a city. In 1855 the street in question was graded and paved. By the charter of the city of Pontiac, all rights belonging to the village of Pontiac, and all obligations, and all streets, alleys, rights, and privileges of said village, it is declared, shall be and remain, accrue, and belong to the city of Pontiac, so far as the same are not repugnant to this act. Section 6, chap. 22, Act No. 215, Pub. Acts 1895, provides that whenever any street, alley, or public highway shall have been graded, or pavement shall have been constructed in conformity to grades established by authority of the city, and the expense thereof shall have been assessed upon lots or lands bounded by or abutting upon such street, alley, or public highway, the owner or owners of such lots or lands shall not be subject to any special assessment occasioned by any subsequent change of grade in such pavement, street, alley, or public highway, unless such change be asked for by a majority of the owners of such lots or lands, but the expense of all improvements occasioned by such change of grade shall be chargeable to and paid by the city. It is contended that, under this provision, the city had not the authority to assess this tax against the defendant, because it appears that the improvement was not petitioned for by a majority of the property owners.

It is perhaps fairly to be inferred from the testimony that the street was paved with cobblestones in 1855 at the expense of the abutting owners, and, if we assume that this provision applies to such paving as had been done by the abutting owners at this time, the question is whether the case falls within the provisions of this statute. The power to pave and repave at the expense of adjacent pro-

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prietors, and to replace an insufficient pavement with new, appears not to be questioned, except as it be limited or restricted by this charter provision. Was this an assessment *occasioned* by a subsequent change of grade in the pavement laid down in 1855, within the meaning of this act? We think not. The fair deduction from this record is that the pavement was deemed inadequate for present necessities and requirements; that it was deemed desirable to pave with asphalt. The action taken had reference to repaving. As an *incident* to such repaving, the actual grade, as it existed, was changed slightly, and in this way: With a cobblestone pavement, it appears that the crown of the street was higher than it need be with a smooth, asphalt pavement, so that in the center the street was cut down, and the sidewalk line raised somewhat. As to the change in the grade, the surveyor testified that the only change in the grade was to get an even graduation of the street; and that is true with reference both to the center of the street and the curb line. It is confusing terms to say that this assessment was occasioned by the change of grade in the pavement. The slight change which was made in the grade was occasioned by the fact of the improvement of the pavement. The case is very similar in principle to that of *O'Reilley* v. *Kingston*, 114 N. Y. 439 (21 N. E. 1004).

We construe this limitation of authority above quoted as precluding a repavement *made necessary* by the fact that the grade of the street had been changed in so substantial a way as to do away with the former pavement, as by a large cut or fill. That is not this case. It is manifest that the necessity of repavement was determined by the council without any thought of any substantial change in the grade. That followed upon the determination as necessary in view of the character of the pavement adopted. We think the statute does not limit the authority.

The decree of the circuit judge directing a sale of these lands for taxes will be affirmed.

The other Justices concurred.

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WILLIAMS BROS. CO. v. HANMER.

1. CHATTEL MORTGAGES — ACCOMMODATION MAKER — ASSIGNMENT TO SUBSEQUENT MORTGAGEE.
   In a suit by a second chattel mortgagee to enforce the assignment to it of the first mortgage, it is no defense that one of the mortgagors was an accommodation maker, where there is nothing to show that complainant had knowledge of it, and nothing in the mortgage to indicate such an understanding.

2. SAME.
   The owner of a second chattel mortgage can compel the assignment to him of the first mortgage upon payment of the amount due upon it.

Appeal from Missaukee; Chittenden, J. Submitted January 16, 1903. (Docket No. 57.) Decided April 7, 1903.

Bill by Williams Brothers Company against Charles Hanmer, John Jollands, and Henry Jollands to compel the assignment of a chattel mortgage. From a decree for complainant, defendants appeal. Affirmed.

Isaac C. Wheeler, for complainant.

F. O. Gaffney, for defendants.

MOORE, J. The bill of complaint was filed in this case to compel the defendant Charles Hanmer, a prior mortgagee, to assign the chattel mortgage held by him to the complainant, who held a subsequent mortgage on a portion of the property covered by said prior mortgage, and to have the property named in said prior mortgage not covered by said second mortgage bear one-half of the indebtedness secured by the prior mortgage. From a decree in favor of complainant, the case is brought here by appeal.

The record discloses that on August 30, 1900, Henry

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Jollands and John Jollands and his wife gave to M. D. Newald a chattel mortgage on certain personal property to secure the payment of six notes, aggregating $325, which were signed by John Jollands and Henry Jollands, though they were referred to in the mortgage as signed by Henry Jollands. This chattel mortgage was a form in common use, and provided that in default of payment, or should the mortgagee deem himself insecure, the whole amount payable should become due and payable, and that the mortgagee might take possession of the property, and sell it either at public or private sale. On the 6th day of April, 1901, Henry Jollands made a chattel mortgage to Williams Bros. Company for $460.08, which covered some of the property covered by the prior mortgage. In this mortgage it was stated the property was free from liens and incumbrances, except a mortgage to M. D. Newald of $275 unpaid thereon. Some payments were made on each of these mortgages, but neither of them was paid in full. January 6, 1902, Mr. Hanmer, at the request of John Jollands, purchased the Newald mortgage, and it was assigned to him. Afterwards complainant tendered Hanmer $182, and demanded an assignment of the Newald mortgage, which was refused. He also offered to pay $91 for an assignment of the Newald mortgage with John Jollands' property released, which was also refused. Hanmer offered, upon payment of $182, to assign the mortgage with John Jollands' property released, which complainant refused.

It is the claim of John Jollands that, in signing the first mortgage and the six notes, he was an accommodation maker for the purpose of aiding his son, Henry, and that complainant knew it when it took the second mortgage, and that the debt secured by the second mortgage was the debt of Henry Jollands and one Freeman, and that he became liable to pay the Newald debt only if Henry did not, and that he at no time became liable to pay the Jollands and Freeman debt, and in equity ought not to be required to pay either debt. Complainant insists

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it had no knowledge that John Jollands claimed to be an accommodation maker of the notes secured by the mortgage, and that, when it took the second mortgage, it was informed of the the first mortgage, and the amount thereof, and that it covered property belonging to John Jollands, with which complainant was familiar, and that because of this information it regarded the second mortgage as fairly good security, and so accepted it.

There is nothing in the first chattel mortgage to indicate that part of the property covered by it belonged to one of the makers, and part to the other, or to indicate that part of the debt secured thereby was to be paid by one of the makers, and another part by the other maker; nor was there any suggestion that one portion of the property must be sold before another. Whatever may have been the understanding between Henry Jollands and his father, John Jollands, as between Mr. Newald and John Jollands, and between third parties and himself, he was bound by the written contract which he entered into. A lien was given upon the property covered by the first mortgage to secure the debt mentioned therein, and, as the debt had not been paid, the lien continued. See *Woodruff* v. *Phillips*, 10 Mich. 500; *Payne* v. *Avery*, 21 Mich. 524. The right of a subsequent mortgagee to take over a prior mortgage is no longer an open question in this State. It is recognized in *James* v. *Brown*, 11 Mich. 25; *Sager* v. *Tupper*, 35 Mich. 134; *Lamb* v. *Jeffrey*, 41 Mich. 719 (3 N. W. 204); *Moore* v. *Smith*, 95 Mich. 75 (54 N. W. 701). When complainant tendered to Mr. Hanmer the amount due on the first mortgage, it had a right to have it assigned.

The decree is affirmed.

The other Justices concurred.

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GLINES *v.* STATE SAVINGS BANK.

1. BANKS—INSOLVENCY—DEPOSITORS—MALA FIDES.
   Circumstances sufficient to put a prudent man on inquiry are insufficient to charge a bank with knowledge that a check deposited in the usual course of business by another bank was received by the latter when insolvent; there must be such evidence as to show bad faith.

2. SAME—DIRECTING VERDICT.
   Where, in an action by the depositor of a check in an insolvent bank against a bank which had received it from the former bank, and paid out its proceeds on checks, there was no evidence that defendant did not act in good faith, a verdict should have been directed for defendant.

Error to Wayne; Frazer, J. Submitted February 5, 1903. (Docket No. 72.) Decided April 7, 1903.

Assumpsit by Walter C. Glines against the State Savings Bank of Detroit for money had and received. From a judgment for plaintiff, defendant brings error. Reversed.

The plaintiff had been a commercial depositor for from 12 to 16 years in the bank of A. Ives & Sons of Detroit. On Saturday, September 8, 1900, he deposited in said bank a check for $300 drawn upon Fleischmann & Co., of Cincinnati, Ohio. He received credit for this amount on the bank's books and on his own deposit book. The deposit was made in the customary manner, and he drew out none of its proceeds. A. Ives & Sons kept a depositor's commercial account with the defendant, which they had opened in May preceding. On the same September 8th, this check, with other items amounting to several thousand dollars, was deposited in the defendant's bank, and due credit given therefor as cash. On the same day the entire amount was paid out on checks issued by A. Ives & Sons,

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except one, which was certified, and, on the following Monday, charged up to their account. On that day, September 10th, A. Ives & Sons opened their bank for business as usual. On said 10th of September they made another deposit with defendant, and drew out all but $30.40.

On Friday, the 7th, or Saturday, the 8th, of September, two checks, aggregating $11,000, had been presented to A. Ives & Sons for payment, and payment refused for lack of cash on hand sufficient to pay them. These checks were held by the First National Bank of Detroit. For some time prior to May 1, 1900, the bank of A. Ives & Sons had been a member of the clearing house, of which the defendant was also a member. A. Ives & Sons then withdrew from the clearing house, borrowed $25,000 of the defendant on a real-estate mortgage executed by Albert Ives, a member of the firm, and deposited the same in the defendant's bank. On August 1, 1900, they borrowed $10,000 more from the defendant upon their note, secured by business paper of their customers, aggregating $23,940, and this also was deposited in defendant's bank. Both were ordinary commercial deposits, and were drawn against in the usual manner. On the afternoon of September 8th, after banking hours, A. Ives & Sons and the First National Bank entered into an agreement reciting the holding by said national bank of the two checks above mentioned, and providing:

"*Whereas*, the State Savings Bank of Detroit holds and is in possession of certain notes to the aggregate amount of $23,940, of which a list, showing the date, the name of the maker, the due date, and the amount of each of said notes, is hereto attached and made a part hereof, marked 'Schedule A,' which notes are held by the said State Savings Bank as collateral security for the payment of certain indebtedness and liabilities of the said A. Ives & Sons:

"Now, therefore, said A. Ives & Sons, being desirous of securing payment of the said checks held by the said First National Bank, in consideration of the premises, and of the

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agreement of the second party to hold said checks and to forbear presentation thereof five days after the date of this instrument, hereby assign, transfer, and set over to the said First National Bank, trustee, subject to the rights of said State Savings Bank therein, all their right, title, and interest of, in, and to the said notes held by the said State Savings Bank as collateral, and described in the said schedule, and all renewals heretofore or hereafter made thereof."

This agreement was carried out, and the defendant, after paying itself the loan of $10,000, turned over the remainder of the collateral to the First National Bank.

A. Ives & Sons kept their bank open about two hours on Monday, September 10th, then closed its doors, and went into voluntary bankruptcy.

After the withdrawal of Ives & Sons from the clearing house, the First National Bank required the certification of the checks of Ives & Sons given in payment of items drawn on them coming through the First National Bank. This was in pursuance of a general rule by which that bank required the certification of all checks given in payment of items which it received against any one not a member of the clearing house. Numerous checks drawn by Ives & Sons on the State Savings Bank during the months of August and September were put in evidence, including a few drawn in favor of the First National Bank, and a considerable number in favor of other banks of Detroit. Of these, the First National Bank checks were certified, as well as a few others, but a large proportion of the checks drawn in favor of the Detroit banks were uncertified. Certain of these certified checks were dated in August, 1900. As to these, the cashier of the First National Bank testified:

"The reason these checks were certified was that they were given in payment of checks that were put in our bank by depositors upon which we had a claim, which was surrendered when we delivered the checks to Ives. We would not surrender them to any bank and release the claim that we had against those checks without a certified check or the cash. It wouldn't make any difference who

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it was, whether a member of the clearing house or not, and it was in conformity with that custom or requirement these checks were certified."

After such withdrawal, checks upon A. Ives & Sons were presented at their own bank, and were paid in cash or in checks on the defendant, the larger checks being usually paid by checks upon the defendant. As to the reason for withdrawing from the clearing house, Albert Ives testified: "I suppose we left the clearing house because it was expensive, and we could get along cheaper." Butler Ives testified:

"We went out of the clearing house because I did not like its methods. I had been fighting it for a number of years. We made weekly statements, and I think the only other statement made was an annual one. The chairman of the clearing house called on us for a detailed statement of our bills receivable, and in our statement to the house we showed a balance of about $200,000. This was made up of bills receivable on hand, cash, bank accounts, and general items. The clearing house committee called on us for a detailed statement of our bills receivable, and I objected to it. As things have turned out, all of this $200,000 was not good, but we supposed then most of it was."

The cashier of the First National Bank testified that he did not know why Ives & Sons left the clearing house, and that he thought it was entirely voluntary.

It is conceded that the bank of A. Ives & Sons was insolvent on September 8th, and had been for some months previous. Both Albert and Butler Ives testified that they then believed that they were solvent.

On hearing of the failure of A. Ives & Sons, plaintiff telegraphed to Fleischmann & Co. to stop payment. The check was protested, but was subsequently paid to defendant. Plaintiff made demand upon defendant for payment of the money received on the check, which was refused, and this suit was then brought. The defendant introduced no testimony. The court submitted the case to the jury under the following instructions:

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"I charge you that if, at the time this draft was received by Ives & Sons, they knew of their condition, of their inability to pay it, if at that time they were bankrupt, and knew it, and took that money under those circumstances, it was a fraud upon the part of Ives & Sons as against Glines, the plaintiff, and that he would be entitled to recover from them that money, or the proceeds of that draft, on account of such fraud as that having been perpetrated upon him by Ives & Sons.

"It appears that this check or draft, whatever it was, was deposited by Ives & Sons with the State Savings Bank, and that they received it as a deposit from Ives & Sons, and became the custodians of that draft. Now, they had a perfect right to receive this draft, if they received it in good faith, without knowledge, or without circumstances coming to their knowledge that would put them upon inquiry, as to the condition of Ives & Sons' Bank; that is, that they had not such knowledge that would put a reasonable man on his guard as to the condition of the bank, or the fraud that had been perpetrated by Ives & Sons, if you shall believe a fraud had been perpetrated. If they were *bona fide* holders of this draft, if they did not know this condition, or if there were not facts and circumstances brought to their knowledge that should put a reasonable man upon inquiry as to whether a fraud of this kind had been perpetrated or not, then they would be entitled to hold that check and to have the proceeds of it, because then they would be entirely innocent of any wrongdoing or fraud in the matter; and if they are not parties to, and did not have knowledge of, or were not possessed of such facts as would put a reasonable man upon his inquiry as to, this fraud, then the verdict in this case ought to be for the State Savings Bank, and not for the plaintiff in this suit. But if they did know of this fraud, or were parties to it, or were in possession of such facts as would put them fairly upon their inquiry in regard to the condition of this bank or the perpetration of this fraud, and they took it with that knowledge, then they would hold it under no better or stronger circumstances than Ives & Sons would; and that is the whole question for you to determine in this matter."

Plaintiff recovered verdict and judgment.

Walker & Spalding, for appellant.

A. F. Wilcox, for appellee.

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GRANT, J. (*after stating the facts*). A. Ives & Sons were in fact insolvent. Plaintiff received no consideration from them for the transfer and deposit of the check. Whether they knew, or should have known, that they were insolvent, or whether they had no reasonable ground for expecting to repay the plaintiff, it is not necessary to determine. We will dispose of the case upon the question whether there is any evidence in the record to hold the defendant liable on the ground that it had knowledge of such facts as to show it to have been a *mala fide* purchaser of the check.

Checks are deposited as cash, pass current as cash, the amount thereof paid out by the bank as cash, and the same check is often used to liquidate several debts. Oftentimes the holder of a check obtains cash for it from a bank instead of depositing it.

Plaintiff seeks to hold the defendant liable under *Mace* v. *Kennedy*, 68 Mich. 389 (36 N. W. 187), and *Goodrich* v. *McDonald*, 77 Mich. 486 (43 N. W. 1019). Those were cases of fraud in the execution of promissory notes. They recognize the rule that whenever a note is based upon fraud, or is void as between the original parties, the burden of proof is then upon the holder to show himself to be a purchaser in good faith. These same cases, however, and many others, recognize the rule that, where there is nothing upon the face of the promissory note to cast suspicion upon it, it is valid in the hands of a holder for value, without evidence that he took it under circumstances which render him guilty of bad faith. It is not enough that the circumstances be suspicious, or sufficient to put a prudent man upon inquiry; they must be such as to show *mala fides* on his part. *Stevens* v. *McLachlan*, 120 Mich. 285 (79 N. W. 627), and authorities there cited; *Davis* v. *Seeley*, 71 Mich. 209 (38 N. W. 901).

The fact that one of the firm of A. Ives & Sons borrowed money of the defendant, and gave security for it, is no evidence of insolvency or of bad faith. Neither was it a circumstance sufficient to put the defendant upon inquiry.

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As the circuit judge very tersely said in his instructions to the jury, "It was evidence of good common sense, and no evidence of fraud." The fact that A. Ives & Sons had withdrawn from the clearing house, if known to the defendant, as it probably was, is no evidence of fraud, or of the insolvency of Ives & Sons. The custom of the First National Bank, and, in some instances, of some other banks, to require certified checks, constituted no notice to the defendant that Ives & Sons were insolvent, that they were engaging in fraudulent transactions, and that the paper received from them was liable to be tainted with fraud. The business in these banks had for months been done in the usual manner,—A. Ives & Sons making deposits and checking out. There is no evidence whatever to indicate that the defendant did not act in the utmost good faith. It had no notice that the plaintiff was a depositor at the bank of Ives & Sons, or whether the check had been deposited or had been cashed. It was conclusively proven by plaintiff's own witnesses that this check was deposited as cash with the defendant in the usual course of business; that on the same day the defendant paid out its proceeds on A. Ives & Sons' checks; that it then forwarded it for payment; and that it made no profit whatever by the transaction. These facts fully satisfied the law which casts the burden of proof upon the holder of commercial paper tainted with fraud to show good faith, and it was the duty of the circuit judge to direct a verdict for the defendant. See *Fredonia Nat. Bank* v. *Tommei*, 131 Mich. 674 (92 N. W. 348).

This disposal of the case renders it unnecessary to discuss any other questions.

Judgment reversed, and new trial ordered.

The other Justices concurred.

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FITZGERALD *v.* CITY OF BENTON HARBOR.

APPEAL—RETRIAL—FORMER DECISION—LAW OF CASE.

Where, in a case which has been reversed and a new trial had, the record discloses no different questions or evidence than upon the first trial, the former decision is the law of the case.

Error to Berrien; Coolidge, J. Submitted February 17, 1903. (Docket No. 82.) Decided April 7, 1903.

Case by Edith Navarre Fitzgerald against the city of Benton Harbor for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

Humphrey S. Gray (*George M. Valentine*, of counsel), for appellant.

Gore & Harvey, for appellee.

GRANT, J. A statement of this case, both as to the facts and the principles of law involved, is found in 126 Mich. 618 (86 N. W. 138). The case has been again tried, resulting in a verdict for the plaintiff, and it is again before us for review.

The learned counsel for the defendant do not point out wherein the record in the present case differs from that in the former, and make no claim that it does. A comparison of the briefs and records shows that they are substantially the same. Counsel argue the same points, substantially, that were argued before. We said in the former case that it was "a close one on its facts," but held that there was evidence on the question of the negligence of the defendant and the contributory negligence of the plaintiff sufficient to justify its submission to the jury. The witnesses for the plaintiff were the same on both trials, and it is not claimed that any witness testified differently upon the second from what he did upon the

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first. Upon the former trial the court directed a verdict for the defendant when the plaintiff had rested her case. Upon the second trial the defendant introduced testimony to meet the case made by the plaintiff. Plaintiff, under the former decision, was entitled to have the case submitted to the jury upon her theory of the case, which we then held to be sufficient to warrant its submission to a jury. On all questions there decided that decision is the law of the case. It was submitted to the jury by the court in accordance with that decision, and we think correctly. There is no important principle involved which requires an extended discussion.

The judgment is affirmed.

The other Justices concurred.

O'CONNOR *v.* KEENAN.

1. MORTGAGES—FORECLOSURE—SALE IN PARCELS.
   A statutory mortgage foreclosure sale of three lots, occupied by three distinct and separate tenancies, as one parcel, is void, although there was a fence around the entire tract.

2. PARTITION—MORTGAGES—FORECLOSURE—PARTIES.
   Under 3 Comp. Laws, § 11020, relating to the partition of lands, a mortgagee has a right to sell lands during partition proceedings therefor, and, upon failure to redeem, to become a party to the partition proceedings.

3. SAME—VOID SALE—RESALE.
   Where a mortgage sale of lands pending partition proceedings is held void for failure to sell in parcels, the mortgagee should be permitted to resell upon failure to redeem within a time to be specified in the decree.

Appeal from Wayne; Frazer, J. Submitted February 18, 1903. (Docket No. 90.) Decided April 7, 1903.

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Bill by Timothy O'Connor, trustee, against William J. Keenan and others, for a partition of certain lands. After a decree for partition, J. Ward Howland, executor of the last will and testament of John Ward, deceased, petitioned to be made a party, claiming as purchaser at certain mortgage sales; and from a decree declaring the sales void he appeals. Modified.

One Honora Keenan died intestate October 13, 1896, seised of certain lands, and leaving as her sole heirs at law four children, William J., Michael J., Thomas P., and Mary Ann Danaher. Mrs. Danaher died December 1, 1896, leaving a will by which she devised her one-fourth interest in these lands to complainant, Timothy O'Connor, in trust for her three children. He filed this bill February 3, 1898, to secure a partition of the lands. Thomas P. died June 7, 1897, intestate. His one-fourth interest thus passed to his two brothers and the children of his sister, subject to a mortgage of $300. Michael J. executed five mortgages on his one-fourth interest, aggregating $1,175. He died November 20, 1899, leaving a widow and two children. Decree for partition was entered April 17, 1900. On March 12, 1900, one Mary E. Barnard, the mortgagee of the above mortgages, commenced foreclosure, by advertisement, of the Thomas P. Keenan mortgage and the last of the Michael J. Keenan mortgages. Sales were had, and the mortgaged interests were bid in by Charles Amsden and J. Ward Howland, executors of the will of John Ward, deceased. The lands were sold in three parcels, the third parcel being described as follows: "Lots 17, 18, and the southerly 40 feet of lot 16 of the subdivision of that part of private claim 10, occupied as one parcel." The parties did not redeem, and, after the expiration of the time of redemption, Mr. Howland, as surviving and sole executor, presented to the court his petition under 3 Comp. Laws, § 11020, reading as follows:

"If, at any time prior to the confirmation of the report of the commissioners appointed to make such partition,

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any person * * * who has acquired a title in fee to any part of said premises by virtue of any mortgage or execution sale of any interest thereon shall apply to the court by petition setting forth his interest in the premises, the court shall thereupon direct that such person be made a party to such proceedings, and shall make such other or further orders and decrees respecting the rights of such person as shall be agreeable to equity."

The petition was resisted by defendants for the following reasons:

"1. The defendant Barnard had no right to foreclose her mortgages, because she was a party to the cause. She must wait the end of the partition suit, and only enforce her securities then.

"2. The defendants claimed that Mr. Howland had verbally agreed to extend the time for redemption.

"3. Lots 17, 18, and the southerly 40 feet of lot 16 were improperly sold as one parcel, and for that reason the foreclosures were void."

The court sustained the third contention, set aside the foreclosure sales, and admitted Howland as a defendant as mortgagee only.

The statute governing foreclosure sales reads as follows:

"If the mortgaged premises consist of distinct farms, tracts, or lots not occupied as one parcel, they shall be sold separately, and no more farms, tracts, or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest, and the costs and expenses allowed by law; but, if distinct lots be occupied as one parcel, they may in such case be sold together." 3 Comp. Laws, § 11139.

Aside from the three distinct descriptions contained in parcel 3, the record discloses that on each separate lot were a house and outbuildings inclosed by fences running back about 150 feet; that each house and the land connected with it by fences, and by plowed ditches extending from the fences to the rear end, was occupied separately by tenants, and the entire parcel 3 was inclosed by fences. Mrs. Honora Keenan purchased these lots by three different deeds at different times, and from three different

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parties. The description in the first deed was lot 18 and the southerly 20 feet of lot 17, that in the second deed was the northerly 60 feet of the southerly 80 feet of lot 17, and that in the third deed was the southerly 40 feet of lot 16 and the northerly 20 feet of lot 17. The occupancy was in accordance with the descriptions of these three deeds. Each full lot had a frontage of 100 feet. The depth of each, including the 40 feet of lot 16, was 575½ feet.

Edward A. Barnes and *U. Grant Race*, for complainant.

Wilkinson, Post & Oxtoby, for appellant, J. Ward Howland.

John Miner, for defendants Keenan.

E. A. Fink, for defendants Danaher.

GRANT, J. (*after stating the facts*). 1. We think this is not a case where the mortgagee is at liberty to ignore the statute, and sell three separate lots of land in one parcel. They were not occupied as one farm or lot; but were occupied by three separate and distinct tenancies. It is true that these tenancies were in accordance with the descriptions in the three deeds by which the grantee obtained title, but this does not constitute occupancy as one parcel. That the intention of the owners was to subdivide the tract into city lots does not authorize a sale as one parcel. The lands were worth much more than the amounts of the mortgages. There is nothing to indicate that each lot could not be sold separately to advantage. The statute is designed to protect the mortgagor in his right of redemption. We think the sale was void under the former decisions of this court. *Keyes* v. *Sherwood*, 71 Mich. 516 (39 N. W. 740); *Hawes* v. *Insurance Co.*, 109 Mich. 324 (67 N. W. 329, 63 Am. St. Rep. 581).

That there was a fence around the entire parcel we consider of no significance. Such fence was necessary to the occupancy of each of the tenants. Nor is it conclusive that in the bill for partition and in the decree the lands

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were described as consisting of three parcels, one of which was composed of two and four-tenths lots. Such descriptions may have been proper for partition purposes, but do not control in foreclosure sales under the statute, which requires "distinct farms, tracts, or lots not occupied as one parcel" to be sold separately.

Counsel for appellant cite and rely upon *Gage* v. *Sanborn*, 106 Mich. 269 (64 N. W. 32), and *Harris* v. *Creveling*, 80 Mich. 249 (45 N. W. 85). In *Gage* v. *Sanborn* the suit was by summary proceedings to recover possession of lands sold upon mortgage foreclosure. The description was similar to that here,—two lots and a part of another. That holding was based upon the fact that there was no evidence to show that the lots were not adjoining and used as one parcel, and the *onus probandi* was upon the defendant. *Harris* v. *Creveling* was a similar case.

The decree of the court setting aside the sales is sustained.

2. Under 3 Comp. Laws, § 11020, the mortgagee was justified in proceeding to sell, and, upon failure to redeem, to become a party to the partition proceedings, and succeed to the rights of the mortgagors. But the sale being held void, and the proceedings prior to the sale being regular, it follows that the decree should provide a specified time for redemption, and, upon failure to redeem within that time, a resale of the premises. *Huyck* v. *Graham*, 82 Mich. 353 (46 N. W. 781). The decree, in so far as it adjudged the appellant to succeed to the mortgage interests of Mary E. Barnard, and to be admitted a defendant as the holder of such mortgage interests, does not give him any right to proceed under the foreclosure proceedings, but leaves him to new proceedings, either in chancery or by advertisement. In this respect the decree must be modified, and 60 days given within which to pay the amount due. Upon failure to pay within that time, appellant may proceed to sell under the foreclosure proceedings.

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The decree will be modified and entered in this court in accordance with this opinion. The appellant will recover the costs of this court.

HOOKER, C. J., MOORE and MONTGOMERY, JJ., concurred. CARPENTER, J., did not sit.

LANDSBERG v. TIVOLI BREWING CO.

1. LANDLORD AND TENANT—HOLDING OVER—RENEWAL OF LEASE.
Plaintiff, shortly before the expiration of a written lease, wrote her tenant that she would renew the lease at an increased rental. Defendant's agent replied by telephone that it could not keep the premises at the increased price, but would take its fixtures out as soon as it could, to which plaintiff replied, "All right." Defendant vacated the portion of the premises occupied by it one week after the expiration of the lease, and a subtenant, six weeks after its expiration. *Held*, that, by holding over, defendant did not become plaintiff's tenant for another year.

2. SAME—TENANCY AT WILL—NOTICE TO QUIT.
Under an arrangement that a tenant should hold over after the expiration of a written lease until it could remove its fixtures, where the rent was payable monthly, a full month's oral notice to quit by the tenant was sufficient.

Error to Wayne; Frazer, J. Submitted February 18, 1903. (Docket No. 91.) Decided April 7, 1903.

Assumpsit by Isabella Landsberg against the Tivoli Brewing Company for rent. From a judgment for defendant, plaintiff brings error. Affirmed.

Wilkinson, Post & Oxtoby, for appellant.

Duncan C. Beath, for appellee.

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MOORE, J. The following statement of facts is taken, with a few changes, from the brief of counsel for appellant:

"The plaintiff sued the defendant for rent of a store building for the months of July and August, 1901, claiming $45 per month. She recovered judgment for $90 and costs in the justices' courts for Detroit. Defendant appealed the case to the circuit court, where the jury found for the defendant. The plaintiff appeals.

"Isabella Landsberg and her husband (since deceased), on October 3, 1899, leased to the defendant a brick store at the corner of Grand River avenue and Buchanan street for a period of 19 months from and after October 2, 1899. The lease was in writing, in the usual form. It expired, by its terms, May 2, 1901. During the last seven months of the lease the rental was $40 per month. The ground floor of the building was occupied by McVittie & Vincent, subtenants of defendant, as a saloon, and the upstairs flat was occupied by John Mulheron, who was a subtenant of McVittie & Vincent, at a monthly rental of $10.

"On April 18, 1901, the plaintiff wrote the defendant, stating that their lease expired on May 2d, and that she would be pleased to renew the lease with them at the rate of $45 per month (an increase of $5 per month), giving them a three-year lease of the same. The reply to this letter was by telephone, and involves the issue of fact which the trial judge submitted to the jury. Plaintiff testified that defendant's secretary, Mr. Schimmel, called her up, and said 'they could not afford to pay $45 a month rent,' and that she told them she could not take less, and 'they said they would have to keep the building, because the man that was in it owed them a great deal of money.' Mr. Schimmel, on the other hand, testifies that what he said to Mrs. Landsberg was the following: 'We had lost considerable money in the place, and that we could not afford to keep the place at $45; that we had lost considerable money, and we would have to drop it, and we would take our fixtures out as soon as we could. She said she had another offer at $45. I said we could not afford to pay it; we had lost considerable money in that place. She said it was all right.'

"About May 9th (seven days after the expiration of the written lease) Mrs. Landsberg telephoned the defendant, asking why she had not received the usual check. The

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defendant answered that they were going to give up the premises and send down the keys. Mrs. Landsberg replied that she would not accept the keys, and that she considered them her tenants. That afternoon the keys were sent to the plaintiff by registered mail. Plaintiff, by her attorneys, at once wrote the defendant, notifying them that, as they had held over possession of the premises, plaintiff considered them her tenants at $45 per month, and would not accept a surrender of the premises, but would undertake to rent for defendant's benefit. It subsequently developed that, although the defendant sent down the keys on May 9th, and vacated the store about that time, the subtenant, Mr. Mulheron, remained in possession of the upstairs portion of the building until June 12th. Mr. Mulheron paid his rent for May to McVittie & Vincent, defendant's sublessees, about May 1st. He paid no rent from June 1st to June 12th. On June 11th defendant's attention was called to this fact by a letter from plaintiff. The subtenant, Mr. Mulheron, did not move out until about June 12th.

"Defendant refused to pay any rent whatever, and after rent had accrued for May and June plaintiff began suit in justices' courts for the amount then due. The bill of particulars in that suit calls for two months' rent at $45 per month, and also for cost of certain repairs, amounting to $27. This suit was discontinued on August 17, 1901, upon defendant paying to plaintiff the sum of $92.75, being $90 for the rent for the months of May and June and $2.75 costs. The receipt given to defendant was a receipt for two months' rent. The premises remained vacant up to September 1st. There is no claim made that there was any acceptance of defendant's attempted surrender of the building.

"On August 19, 1901, this suit was commenced in justices' courts for the rent for the months of July and August, 1901, at $45 per month. At the conclusion of the evidence plaintiff moved for a direction of a verdict, which was refused, and also presented three requests for a like direction, all of which were refused. The questions involved relate to the charge of the court, and are raised by exceptions to his charge as given and to the refusal of plaintiff's requests. The trial judge submitted the case to the jury on the basis of the telephone conversation which was had between Mrs. Landsberg and Mr. Schimmel after receipt by him of her letter of April 18, 1901. The jury evi-

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dently found the version of Mr. Schimmel to be correct, and found for defendant."

Plaintiff claimed on the trial and claims here that, notwithstanding Mr. Schimmel's version of the conversation of April 18th, defendant became her tenant by holding over; that, although Mr. Schimmel testified that she said "All right" in answer to his statement that the defendant would not renew after May 2d, and would take out their fixtures as soon as they could, the occupation of the upstairs portion of the building by their subtenant, Mr. Mulheron, for six weeks after May 2d, and after receipt by the defendant of the letters of May 9th and June 11th, and their payment of rent for two months, constituted such a holding over as made defendant a tenant for another year. The theory of defendant is that plaintiff consented to the holding over of the defendant for such time as might be necessary for the purpose of removing its fixtures; that this was not accomplished until May 9, 1901; that the estate thus created was an estate at will; that, no yearly tenancy being contemplated, and the rent payable monthly, it was such an estate as could be terminated by either party giving to the other the notice required by the statute.

Plaintiff's counsel argue for the following propositions:

"1. The plaintiff's right to recover was not based on the telephone conversation in April. It was based on the fact that defendant held over after May 2d.

"2. The holding over of Mulheron, the subtenant, for six weeks after May 2d, was such as to make the defendant, at plaintiff's option, her tenant for another year.

"3. Defendant's holding over for six weeks after receipt of plaintiff's letter of May 9th made defendant liable at the increased rental of $45, instead of $40."

The principal case upon which plaintiff relies is *Mason* v. *Wierengo's Estate*, 113 Mich. 151 (71 N. W. 489, 67 Am. St. Rep. 461). As we read that case, instead of sustaining the claim of counsel it is an authority for defendant. Justice HOOKER, speaking for the court, said:

"In the absence of qualifying circumstances implying

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consent to a holding under some new arrangement, the holding over is a legal trespass, and does not depend upon the intention of the tenant. It is a wrongful holding, whatever the cause, though perhaps not culpable in a moral sense, and the rights of the landlord are definitely fixed by the law. This question was reviewed in *Campau* v. *Michell*, 103 Mich. 623 (61 N. W. 890), and the opinion of the court as there indicated was contrary to the defendant's position in this case. That case was exceptional, in that the defendant's tenant was induced to hold over by the mistake or misconduct of the plaintiff's agent, and the doctrine of estoppel was applied. See, also, *Bradley* v. *Slater*, 50 Neb. 682 (70 N. W. 258). We think that there is uniformity in the decisions against the contention that the intention to vacate as soon as possible can affect the right of the landlord to elect to treat the holding over as a renewal of the lease for a year. It requires some express or implied consent upon his part to a holding over upon other conditions. This is wanting here."

In the present case, according to the plaintiff's version, she refused to renew the lease unless the tenant would pay $5 a month more than it was required to do by the terms of the written lease; and, when she refused to renew the lease for less than $45 a month, she says "the answer came that they would have to keep the building, because the man that was in it owed them a great deal of money;" thereby consenting, according to her statement, to a new arrangement from the written lease. On the other hand, the defendant claims, and the jury found by its verdict its claim to be true:

"We received this letter of April 18th. A few days following after the receipt of that letter I told her that we had lost considerable money in the place, and that we could not afford to keep the place at $45; that we had lost considerable money, and we would have to drop it, and we would take our fixtures out as soon as we could. She said she had another offer at $45. I said we could not afford to pay it; we had lost considerable money in that place. She said it was all right."

It is very clear from the testimony of the plaintiff and the agent for defendant that neither of them understood

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the defendant was to continue under the terms of the written lease, but they did understand the holding over was under a new arrangement. See *Campau* v. *Michell*, 103 Mich. 623 (61 N. W. 890). Within a few days after the expiration of the written lease defendant removed its fixtures. In reply to a request from Mrs. Landsberg over the telephone, made May 9th, asking why a check had not been sent her for the rent, she was informed defendant would not continue as tenant, and would send her the keys, which they did that afternoon by registered mail. On June 11th the attorneys for plaintiff called the attention of defendant to the fact that another month's rent was due, and that Mr. Mulheron was still in possession of part of the premises, and that there had been no surrender of possession by the defendant, and threatened to bring suit if the rent for May and June was not paid. Mr. Mulheron, on the 12th of June, vacated that part of the premises occupied by him. Later suit was brought, and the defendant, apparently recognizing that, as it occupied part of the premises until the 9th of May, and Mr. Mulheron occupied them until the 12th of June, it must pay rent for those months, on the 17th of August paid the costs of court and the rent for May and June. As the defendant, three months before this time, had sent the keys to plaintiff, and surrendered that portion of the building occupied by it, and Mr. Mulheron, two months before, had surrendered the possession he had, it is very clear this payment was not made as an acknowledgment that the tenancy continued later than June. As the jury have found that defendant held over, by the express consent of the plaintiff, until it could remove its fixtures, it became at most but a tenant at will. *Benfey* v. *Congdon*, 40 Mich. 283; *Barrett* v. *Cox*, 112 Mich. 220 (70 N. W. 446); *Hilsendegen* v. *Scheich*, 55 Mich. 468 (21 N. W. 894). See *Lane* v. *Ruhl*, 94 Mich. 474 (54 N. W. 175). If, under the arrangement, any notice was required, as the rent was payable monthly, a full month's notice before the 2d day of July was sufficient. 3 Comp. Laws, § 9257. An oral

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notice was sufficient. *Fratcher* v. *Smith*, 104 Mich. 537 (62 N. W. 832), and cases cited therein. We think the record shows the tenancy was terminated, and no rent was due to plaintiff.

Judgment is affirmed.

HOOKER, C. J., GRANT and MONTGOMERY, JJ., concurred. CARPENTER, J., did not sit.

HUEBNER v. NIMS.

SCHOOL TRUSTEES—CONTRACTOR'S BOND—SURETIES—LIABILITY OF TRUSTEES.

Where the trustees of a school district required a contractor for building a schoolhouse to furnish the bond provided for by 3 Comp. Laws, §§ 10743-10745, and in good faith approved of the sureties, who justified that they owned sufficient property in Michigan, the trustees were not liable to one who furnished the contractor material, though the sureties were residents of Canada, and owned no property in this State.

Error to Huron; Beach, J. Submitted February 18, 1903. (Docket No. 99.) Decided April 7, 1903.

Case by Julius J. Huebner against Charles S. Nims, Nelson P. Arnold, Bela W. Jenks, Matthew D. Wagner, and Joseph J. Lescyzinski for failure to exact an adequate statutory bond. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Affirmed.

James D. May (*Robert T. Speed*, of counsel), for appellant.

Charles L. Hall and *John F. Murphy*, for appellees.

MOORE, J. This is an action brought by plaintiff against the five defendants as individuals to recover

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$1,361.67, the balance claimed to be due him from the firm of Ballman & Wellman, who were the contractors for building a schoolhouse. The defendants were the five trustees of the school district. The judge directed a verdict for defendants. The case is brought here by writ of error.

It is claimed the defendants are liable because they failed to take a bond or bonds with adequate sureties for the protection of the materialmen, as required by 3 Comp. Laws, §§ 10743–10745. It is not claimed the bonds were not for a proper amount or in proper form, but it is claimed the sureties were nonresidents of the State, and that the trustees had such knowledge of their not having any property in the State that they ought not to have accepted the bonds, and are personally liable to the materialmen,—citing *Wells* v. *Board of Education*, 78 Mich. 260 (44 N. W. 267), and other cases; and that their good faith in taking the bonds would not relieve them from liability.

Plaintiff's claim is made up of a balance of $676.12 for materials and factory work furnished by him, and a claim of $685.55 for materials furnished by the Detroit Lumber Company, which claim was assigned to him. The record discloses that on or before March 10, 1900, the school board let the contract to Ballman & Wellman for the construction of the schoolhouse. Before the contract was signed, the contractors were required to give bonds. These bonds were executed by Ballman & Wellman, as principals, and by John Jay and Charles Baxter, as sureties, before Mr. Eugene Clarkson, a notary public and attorney at law at Detroit, Mich., on March 10, 1900, the sureties justifying under oath that they resided in Windsor, Ontario, but owned property in the county of Wayne, Mich., sufficient to fully cover the amount of the bonds. After being so executed, the bonds were mailed to the board of trustees at Harbor Beach for their approval. The trustees, before taking action on the bonds, sent Matthew D. Wagner, the director of the district, to investigate the matter. He went to Port Huron, and called

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on the architect of the building, and together they went to the office of a lawyer of that city, who had drawn the contract and bonds. A question was raised between Mr. Wagner and the lawyer as to whether the sureties owning property, as they had sworn, in the county of Wayne, made the bond signed by them a valid bond, though they were not residents of the State. Mr. Wagner was advised that, as the sureties had qualified that they had property in the county of Wayne, though they lived in Canada, their bonds were perfectly good, and the board would only do its duty by accepting them. Mr. Wagner then saw the lawyer before whom the bonds were signed, and was assured by him that the bonds were executed before him, and that the sureties justified before him, as stated in the bonds.

Mr. Wagner, upon his return to Harbor Beach, reported to the board what he had learned, and advised the board that he thought it safe to accept the bonds. The board voted to do so, and March 15th signed the contract, and sent a copy of it to the contractors. On the 16th of March Mr. Wagner wrote the sureties in the name of the school district, directing his letter to them at Windsor, calling their attention to the fact that it had the two bonds, and that it had been assured by Mr. Clarkson, the notary public, that the sureties affirmed they owned "unincumbered property in Wayne county to the value of the bonds, so we have accepted you as bondsmen. Is Mr. Clarkson's understanding of the matter correct?" The contractors entered upon their work on the 19th of March. Mr. Baxter replied to the letter of March 16th under date of March 20th, saying the notary had made a mistake, "as I have no property in Wayne county, but have property to the value in Windsor, Canada." The bonds and contract were pasted in a book, and the letter of March 20th was pasted under them in the same book.

Some time the last of June or early in July the plaintiff made investigation into the financial standing of the contractors. At this time he had furnished about $600 worth

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of materials and work, and had been paid about $300. Afterwards payments were made to him amounting to about $1,100. He had an interview with the architect at Port Huron, who suggested to him he had better go to Harbor Beach and look the papers over, and satisfy himself as to the responsibility of the contractors. He went to Harbor Beach, and the book in which the contract and bonds and Mr. Baxter's letter were pasted was given to him by Mr. Wagner, and he made such examination of them as he desired. He admitted on the trial that he saw the bonds and the contract, but claimed he did not look over any other papers on that page. At the time this suit was brought, the school district had paid the contractors all but about $30 of the contract price. The plaintiff had not attempted to collect the balance due him from the contractors or from the makers of the bond.

The first question to be decided is, Are the defendants liable because of a failure to comply with the statute in taking the bonds which were taken by them? The cases cited by plaintiff of *Owen* v. *Hill*, 67 Mich. 43 (34 N. W. 649); *Plummer* v. *Kennedy*, 72 Mich. 295 (40 N. W. 433); *Wells* v. *Board of Education*, 78 Mich. 260 (44 N. W. 267); and *Weinberg* v. *Regents of University*, 97 Mich. 246 (56 N. W. 605),—were all cases where no bond in fact was given. In the case before us the board of trustees undertook to comply with the provisions of the statute, and, before accepting the bonds, sought counsel as to their duty. It was not until after the bonds had been accepted, and the contract signed, that the board learned from one of the sureties that his property was not in this State, but in Windsor, he at the same time saying he had property of the requisite value in Windsor. The record is clear, we think, that the board acted in good faith, meaning to comply with the provisions of the law. In *Owen* v. *Hill*, 67 Mich. 43 (34 N. W. 649), Justice CHAMPLIN, who wrote the opinion, in which it was held the trustees would be liable for not taking the bond required by the statute, used the following language:

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"The mere act of requiring a bond is a ministerial act involving no discretion, and consequently no judicial functions. In addition to requiring the bond, the law requires that they shall first fix the amount in which the bond shall be given, and, second, they shall pass upon the sufficiency of the sureties. These two requirements doubtless involve in a limited measure the exercise of judicial functions. I do not think these functions are so connected with the ministerial duty of requiring the bond as to be inseparable, nor do I think that the performance of one involves the exercise of the other. In neglecting to require a bond at all, the board neglected the performance of a plain ministerial duty imposed by statute, and it is well settled that, when the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures. * *

"But whether the whole transaction of requiring the bond and its approval be looked upon as involving the exercise of judicial functions, I am still of opinion that defendants would be liable for an entire neglect to attempt the performance of the duty required by statute. It is a general principle that courts or officers exercising judicial functions shall not be held liable for any error of judgment. There is a distinction, however, between cases where parties invested with discretionary authority exercise it to the injury of an individual, and where they neglect to exercise it at all."

This indicates very clearly that, while the board might be liable for neglect to act at all, if they had in good faith attempted to comply with the statute there would be no liability. There is no safety in any other rule. It is for the board to determine the amount for which the bond shall be given, and the sufficiency of the sureties. In deciding these essentials it is acting at least *quasi* judicially, and for an error of judgment its members are not to be mulcted in damages. In *Reed* v. *Conway*, 20 Mo. 22, it is said:

"I do not think it necessary to cite further authorities to support the general proposition I laid down, viz., that where a ministerial officer does an act as a judge, or does a judicial act, which is within his power and jurisdiction, then, although an injury may arise to another, yet such officer is not liable to a civil action by the injured party,

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unless it be proved that the act was willful and malicious. The cases from Denio go further, and exempt such officer thus acting from all liability to civil action, however malicious or corrupt his motives. Without agreeing to or dissenting from the views of the court in the two cases last cited, the authority of the highest courts in England and our country will bear out the proposition that the ministerial officer, acting judicially within his jurisdiction, is not liable, unless his acts be willful and malicious."

See the many cases cited therein; also *Edwards* v. *Ferguson*, 73 Mo. 686; *Chamberlain* v. *Clayton*, 56 Iowa, 331 (9 N. W. 237, 41 Am. Rep. 101), and cases there cited.

Having reached this conclusion, it is not necessary to say whether defendants are relieved from liability because the plaintiff, before furnishing the material and doing the factory work for which he sues, knew what bond had been taken, and who the sureties were, and that they were nonresidents of the State. Nor is it necessary for us to decide whether plaintiff was bound to make an effort to collect his claim against the principal contractors before bringing this suit.

Judgment is affirmed.

The other Justices concurred.

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PEOPLE *v.* JENNINGS.

1. CRIMINAL LAW—ADULTERATION OF FOOD—LEMON EXTRACT.
   In a prosecution under the pure food law (2 Comp. Laws, § 5012) for selling a compound as lemon extract which was adulterated, the pharmacopœia formula may be taken as the standard for lemon extract.

2. SAME—IMPROVEMENT OF FOOD PRODUCTS.
   The statute does not prevent improving a common article of food where the law and spirit of the act defining adulteration are not infringed.

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3. SAME—CONSTRUCTION OF STATUTE.
The provision of 2 Comp. Laws, § 5012, that an article is adulterated, "*second*, if any inferior or cheaper substance or substances have been substituted wholly or in part for it," should be construed in connection with the following provision, "if any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it," and therefore means the substitution of a cheaper or inferior substance for an essential ingredient.

4. SAME—INSTRUCTIONS—LEMON EXTRACT.
An instruction that if *any* ingredient of lemon extract, as defined by the pharmacopœia, was wanting in the extract sold by respondent, there should be a conviction, was erroneous.

5. SAME—COLORING MATTER.
The provision of the statute prohibiting coloring an article, whereby damage or inferiority is concealed, has no application where the coloring matter employed in the manufacture of a lemon extract was not injurious to public health, and the difference from the standard article in other respects consisted only in the elimination of nonessential ingredients.

6. INSTRUCTIONS—EXPERT TESTIMONY.
It is error for a judge, in his charge to the jury, to refer to expert testimony as "boughten testimony."

Exceptions before judgment from Muskegon; Russell, J. Submitted February 20, 1903. (Docket No. 207.) Decided April 7, 1903.

Charles W. Jennings was convicted of violating the pure food law. Reversed.

Knappen, Kleinhans & Knappen and *L. N. Keating*, for appellant.

Charles A. Blair, Attorney General, and *George S. Lovelace*, Prosecuting Attorney (*Cross, Lovelace & Ross*, of counsel), for the people.

MONTGOMERY, J. This is a prosecution under the pure food law, so called. The respondent was convicted under an information charging him with selling a compound as

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a lemon extract which was adulterated, within the meaning of Act No. 193, Pub. Acts 1895, as amended, and was a compound in imitation of extract of lemon. The respondent was convicted, and brings the case up on exceptions before sentence.

The evidence introduced on the trial by the respondent tended to show that lemon oil contains from 3 to 10 per cent. of citral, so called, and upwards of 90 per cent. of so called terpenes; that these terpenes represent the oil properties; that they are in reality the oil itself, freed from the citral; that citral is the principal flavoring and odor-bearing property of lemon oil; that the tendency of the terpenes in the oil of lemon is to deteriorate or become rancid by long standing, and that because of this the extract or spirits of lemon in which terpenes appear in the usual quantities becomes turpentiney, both in smell and taste, and that for this reason it is undesirable to have terpenes present; that the terpenes have a biting taste, easily developing a turpentine taste, not the true flavor of the lemon fruit. There was also testimony tending to show that this fact created a demand for terpeneless oils, and that terpeneless lemon oils had been manufactured and sold commercially for a considerable time.

On the part of the prosecution, the testimony of the chemist of the pure food department was to the effect that, taking as a standard of extract of lemon the spirits of lemon as defined by the United States Pharmacopœia formula, the extract produced by the respondent showed no lemon oil present. It further appears that spirits of lemon made according to the pharmacopœia formula would contain from 25-100 to 35-100 of 1 per cent. of citral. It also appeared that 30 per cent. of alcohol appeared in the product made by respondent, and that, according to the pharmacopœia formula, 80 per cent. was used, and that it cost less to make the extract using but 30 per cent. of alcohol than if 80 per cent. was used. It was also shown that a trace of coal-tar dye was found in the extract made by respondent, but it was conceded that

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there was nothing whatever injurious in the extract as prepared by Mr. Jennings. The extract sold by respondent was made by what is known as the "shaking-out process;" the purpose being to make an extract that contains no oil and as little alcohol as possible,—a product that contains simply the flavoring properties of the lemon oil, without the terpenes. This system has been employed by Mr. Jennings and by other manufacturers for the past three years, and it is claimed that all the elements and properties of lemon oil remained, except the terpenes; and the testimony tended to show that the complete flavoring qualities are extracted by this process.

The circuit judge charged the jury as follows:

"In 1895 the legislature of this State thought it wise to pass a law relative to the adulteration of food and food products. Perhaps there may have been some amendments since that time, but that was the foundation of the law. That law covers lemon extract, as it covers all other products that are sold on the market. It seems at the time that the law was passed and since that time there hasn't been— There isn't incorporated within that law any specific formula for the manufacture of lemon extract. Now, we can hardly say, gentlemen of the jury, that, at the time of the passage of that law, the legislature didn't have some recognized and defined standard by which these essences or extracts should be governed or controlled. I think it would be hardly fair to the legislature to claim that there wasn't a standard they had in their mind at that time, and, for the purposes of this case, I will instruct you, gentlemen, that at that time, and at this time, this standard that appears here in the United States Pharmacopœia is the standard recognized by the legislators of this State, and the one to which—the one that is in force, so far as it applies to the pure food law of this State, with reference to that particular product. And if this lemon extract here is manufactured in conflict with that formula, as I shall hereafter call your attention to it, and you should so find from the evidence, why, it would be your duty to convict the defendant here.

"By that formula it appears that it is necessary to have 5 per cent. of lemon oil in the lemon extract, and that lemon oil should be cut by a sufficient quantity of alcohol to perform that act. Of course, you know that that means,

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in common parlance, it should dissolve the oil. In addition to that, as the evidence tends to show in this case, after those things are put together, the fluid, whatever it might be, would be nearly the color of water. As coloring, there may be or should be 5 per cent. of lemon rind; and those ingredients, when added together, would be lemon extract; and that, gentlemen, will be the standard as applied to the pure food law of this State.

"Now, gentlemen, I don't mean by that statement that lemon extract cannot be manufactured by any other process except by that to which I have called your attention; I don't mean that. It is the claim of the defendant here that he has discovered a process by which he can manufacture lemon extract containing all of the qualities that lemon extract manufactured according to that formula would possess, and not have entirely all of the ingredients in the first instance that are provided in the formula. And as I view this case, gentlemen, that is one of the important propositions in connection with this case,—that and the question of coloring, in the judgment of the court, is the case,—and that all of the testimony in the case here revolves itself about those two propositions.

"It is the claim of the defendant, as I say, he has discovered a process by which he can produce in this lemon extract all of the qualities that would be produced by adding alcohol and lemon oil together, and that, manufacturing it by that means, he produces it chemically by taking a larger quantity of lemon oil and extracting certain parts of it. Now, gentlemen, if you find and are satisfied by the evidence in this case that, after this lemon extract was manufactured as defendant here claims he did manufacture it, it possesses all the qualities in strength and otherwise that it would possess if manufactured according to this formula, he is not guilty under this law; that is, he is not guilty of manufacturing an impure article, unless there are certain other articles that enter into the case, to which I call your attention. As I say, in the first instance, it is claimed that, according to the formula, it should be alcohol and 5 per cent. of lemon oil. Now, if he, by some other process, can manufacture from the lemon oil and alcohol a product that would contain all of the elements that these two elements would contain if so mixed, he would not be guilty so far, and that would be lemon extract, except the color of it.

"It is conceded here by all parties in interest, I think,

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that the only object of the lemon peel is to produce coloring. But there is another element to which the prosecuting attorney has called our attention. The evidence tends to show, gentlemen, that, if this product is produced as claimed here on the part of the defendant, after production by his process, the product would be nearly water white. As I say, if it contained all of the elements of lemon extract, I don't think he would be guilty, under this law; and if you are so satisfied, of course, at that point it would be your duty to find a verdict of not guilty, unless there is some other matter in which he has violated this law.

"There is another provision of this pure food law that provides that ingredients shall not be colored. In this case it appears that after this fluid substance is produced, which he claims is just the same as produced under this formula, he desires to change it to a lemon color. In other words, he puts in an ingredient which he claims would produce the same effect as this lemon rind. What is the object, gentlemen, or what was the object, of Mr. Jennings' adding this color? If the object was by any means to make it appear better or of greater value than it really is, if that was the object in adding that product, it is your duty, without any question, to find this defendant guilty, because he hadn't any right to add that kind of a product or any other kind of a product to this fluid which he had produced, and sell it for lemon extract, because that is a direct violation of one of the provisions of this pure food law."

We think this charge presents fairly three questions for consideration: *First*, whether the pharmacopœia formula is to be considered as defining lemon extract; *second*, if so, whether an omission of ingredients not essential to its purposes as a food product is a violation of the statute; *third*, whether the instruction relative to the addition of coloring matter should be sustained.

The statute defining what shall be deemed adulteration, so far as it relates to this case, declares that an article shall be deemed adulterated:

"*First*, if any substance or substances have been mixed with it, so as to lower or depreciate or injuriously affect its quality, strength, or purity; *second*, if any inferior or cheaper substance or substances have been

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substituted wholly or in part for it; *third*, if any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it; *fourth*, if it is an imitation of, or is sold under the name of, another article; * * * *sixth*, if it is colored, coated, polished, or powdered whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is; *seventh*, if it contains any added substance or ingredient which is poisonous or injurious to health." 2 Comp. Laws, § 5012.

We are agreed with the circuit judge that in referring to articles of food, and to protect the users thereof, the legislature must have had in view some standard; and, as lemon essence or lemon extract had theretofore acquired a well-defined meaning, we incline to the view that it is proper to resort to the pharmacopœia formula for the purpose of determining what lemon extract consists of. Does it follow from this that the legislature intended to prohibit improvement in the manufacture of lemon extract? If a means should be discovered by which a larger percentage of the flavoring quality of the lemon might be extracted, would it be an infraction of this law that the manufacturer should use such larger proportion of the essential ingredient of the lemon extract? We think not. We think it is open to manufacturers to improve a common article of food, so long as no infringement of the law or spirit of the act defining what shall be deemed adulteration takes place. According to the proofs offered by the respondent, it is very clear in the present case that no substance or substances have been mixed with this extract so as to lower or depreciate or injuriously affect its quality, strength, or purity.

As to the second condition of what amounts to adulteration, the case is not so clear. This provides that, if any inferior or cheaper substance or substances have been substituted wholly or in part for it, it shall amount to adulteration. We think, however, this provision should be read in connection with the succeeding one, to wit, "if any valuable or necessary constituent or ingredient has been

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wholly or in part abstracted from it." So construed, the provision prohibiting the substitution of any inferior or cheaper substance, wholly or in part, for it, means the substitution for an essential ingredient of such cheaper or inferior substance. Now, if it be a fact, as the testimony on the part of the respondent tends to show, that it is a positive advantage to exclude the terpenes wholly from the extract, and to lessen the quantity of alcohol used, then the essential ingredients of lemon extract have not had substituted for them anything inferior or cheaper. We are aware that this view of the law may make it more difficult to establish the individual case, but, as the statute is a penal statute, it should receive a strict construction.

It follows from the views above expressed that the instruction of the learned circuit judge was erroneous, inasmuch as the jury were told, in effect, that if *any* ingredient of lemon essence, as defined by the pharmacopœia, was wanting in this extract sold by the respondent, there should be a conviction. We think the instruction should have been that if the lemon extract sold by respondent contained all the ingredients, and in quantities such as prescribed by the pharmacopœia, which are adapted to use as food, and that nothing was eliminated except such ingredients as could be dispensed with without injury to the product as a food product, there was no violation of the statute.

The only other provision of the statute involved is the sixth, which, in effect, prohibits coloring the article produced, whereby damage or inferiority is concealed. The instruction upon this branch of the law was also erroneous, if we are correct in our view of the main question. The elimination of nonessential ingredients from the extract certainly does not show damage or inferiority, and, as the conceded facts are that the coloring matter employed was not injurious to health in any way, this provision has no application.

The other questions discussed do not require special mention. It may be noted, in passing, that the circuit

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judge, in referring to the testimony of expert witnesses, spoke of it as "boughten testimony." We think this expression was unfortunate. While it is proper for the jury to take into account the fact that expert witnesses are employed at an extra compensation paid them, the implication that the extra compensation necessarily amounts to a purchase of their testimony is hardly warranted. While the jury may consider this fact as bearing on their credibility, it is not proper that the court should intimate an opinion of that character.

The conviction should be reversed, and a new trial ordered.

The other Justices concurred.

PUTZE *v.* SAGINAW VALLEY MUTUAL FIRE-INSURANCE CO.[1]

1. FIRE INSURANCE—PREMATURE SUIT—STATUTORY LIMITATION—PLEADING—GENERAL ISSUE.

   A defense to an action on a fire-insurance policy, that, by a condition in the policy, a claim for loss is not due until 60 days after notice, and that, by statute, suit cannot be brought until 60 days after the claim is due, is not admissible under the general issue. Cir. Ct. Rule 7.

2. SAME—NOTICE OF DEFENSE—SUFFICIENCY.

   A notice which states that suit was prematurely commenced, that plaintiff had not complied with all the conditions of the policy, and had not waited as long as the law required after the claim became due before commencing suit, is sufficiently specific to admit of the defense that, under such policy and statute, suit could not be brought until 120 days after notice of the loss.

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[1] The original opinion in this case was withheld from publication pending the rehearing.

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3. SAME—CLAIM FOR LOSS—WHEN SUIT MAY BE BROUGHT.
The act under which a mutual fire-insurance company was incorporated provided that suit might be brought if payment of a claim was withheld more than 60 days after it became due. A policy provided that a claim for loss should not become payable until 60 days after notice. *Held*, that suit could be brought at the expiration of 60 days after notice of loss.[1] HOOKER, C. J., and GRANT, J., dissenting.

Error to St. Clair; Atkinson, J. Submitted December 7, 1900. (Docket No. 170.) Opinion filed July 2, 1901. Submitted on rehearing January 31, 1902. (Docket No. 133.) Reargued January 14, 1903. Former opinion reversed April 7, 1903.

Assumpsit by Gustave Putze against the Saginaw Valley Mutual Fire-Insurance Company on a policy of insurance. From a judgment for plaintiff, defendant brings error. Affirmed.

Humphrey & Grant and *C. L. Collins*, for appellant.

Avery Bros & Walsh, for appellee.

HOOKER, J. The plaintiff, being owner of a building used for the purposes of a hotel and saloon by one Dwyer and his partner, tenants of the plaintiff, procured a policy of insurance against fire in the defendant company, dated January 12, 1897. In the following March, Dwyer and partner left the premises, and by consent of the plaintiff one Armstrong entered as tenant; and he ran the hotel and saloon, without a license authorizing him to sell liquors, until the premises were burned, on May 8, 1897. On May 22, 1897, an agreement was made for an appraisal of the property. This was made, and it is agreed that, if the plaintiff was entitled to recover in his action, the amount of recovery should be $1,140. Proofs of loss were furnished to defendant on July 11, 1897, and upon July 15th the defendant's secretary wrote to the plaintiff as follows:

[1] On rehearing; original decision *contra*.

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"SAGINAW, E. S., MICH., 7—15—'97.
"GUSTAVE PUTZE, Esq.,
"Port Huron, Mich.

"*Dear Sir:* I have papers purporting to be proofs of the Dutch Farm fire loss. As they do not contain a schedule of the dimensions and materials entering into the buildings and additions thereto, in detail, to make them complete, this will have to be done.

"In view, however, of the fact Armstrong, your tenant, was arrested and convicted of carrying on a disorderly and illegal business, upon your complaint, it seems to me you voided your policy of insurance. Of this, however, I am not fully advised at this time. By reference to lines Nos. 14 and 15, 32 and 33, and 74, of your policy, you will see there are strong conditions in the contract, which you cannot plead ignorance of to evade responsibility in the matter. Respectfully yours,

"P. R. PROCTOR,
"Secretary."

On September 8th plaintiff's counsel wrote and sent to defendant the following letter, inclosing the papers mentioned:

"PORT HURON, MICH., Sept. 8, 1897.
"SAGINAW VALLEY MUTUAL FIRE-INS. ASSOCIATION,
"EDDY BLDG., Saginaw, E. S., Mich.

"*Gentlemen:* Re your policy No. 010,775.

"In this matter we inclose you herewith the original proofs of loss which you had returned to Mr. Putze, together with certified plans of the building burned. You will also find inclosed affidavits of the appraisers, A. J. Smith and J. Pennabaker, together with itemized bill for materials needed to rebuild the Dutch Farm hotel. Kindly let us know as soon as possible whether or not you will pay this loss. Truly yours,

"AVERY BROS. & WALSH."

In answer the defendant's secretary wrote a letter dated September 9, 1897, in which it was claimed that the company was misled and deceived as to the value of the property when the policy was obtained, and that some months before the fire its occupancy was changed, and an unlicensed saloon was afterwards conducted, increasing the hazard. A return of premium was offered to be

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made upon demand. It was said that, under the policy, the defendant had 60 days after notice, ascertainment, estimate, and satisfactory proof of loss was received, in which to consider the question of payment. The letter invited correspondence with a view to settlement.

On November 24, 1897, this action was commenced by summons. Declaration being filed, the defendant filed a plea of the general issue, accompanied by a notice containing the following allegations:

"1. That the policy of insurance declared upon in this case is void and of no effect, in that it was obtained by plaintiff through fraud and misrepresentation:

"(*a*) Because the plaintiff, for the purpose of inducing defendant to issue said policy, fraudulently overestimated and stated to defendant the value of the property insured, and knowingly and willfully stated to defendant that the property was of much greater value than it really was.

"(*b*) Because the plaintiff, for the purpose of inducing said defendant to issue said policy, falsely and fraudulently represented and stated to defendant that the property insured was used for a hotel and regularly licensed saloon, when, as a matter of fact, it was not, at the time of issuing said policy, regularly licensed, or licensed at all, as a saloon, but, on the contrary, was used for the purpose of conducting a saloon therein without license or authority.

"2. That said policy is void and of no force and effect because, at the time that the property described in said policy was burned, the said property was being used for the purpose of illegally and wrongfully conducting a saloon therein without license or authority.

"3. That the plaintiff cannot recover in this action on said policy because there was a change in the use, occupation, and exposure of said property at the time of said fire, different from the use, occupation, and exposure of said property at the time said policy was issued, in that at the time said fire occurred said property was being used for the purpose of conducting a saloon business therein without license or authority.

"4. That the plaintiff cannot recover in this action because the hazard was increased at the time of the fire by reason of the said property being used for conducting a saloon therein without license or authority, all of which was within the knowledge and control of the plaintiff.

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"5. That the plaintiff cannot recover in this case because this suit was prematurely commenced, and at the time of the commencement of this suit the plaintiff had not complied with all the conditions of the law governing this policy, and had not waited as long as the law required after the claim became due before commencing this action, according to the provisions of law governing this case.

"6. That at the time of the commencement of this action the plaintiff was not entitled to bring suit against this defendant upon the said policy under the terms and conditions on which the said policy was issued."

The act under which the defendant was organized contains the following provision:

"Suit at law may be prosecuted and maintained by any member against such corporations for claims which may have accrued, if payments are withheld more than sixty days after such claims shall have become due." 2 Comp. Laws, § 7326.

The policy contained the following provisions:

"The sum for which this company is liable, pursuant to this policy, shall be *payable* sixty days after due notice," etc.

"The loss shall not become payable until sixty days after the notice," etc.

"If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies, or contracts of insurance, such regulations shall apply to and form a part of this policy, as the same may be written or printed upon, attached or appended hereto."

Upon the trial it was contended by the defendant that, by the terms of the policy, the plaintiff's claim was not due until the expiration of 60 days from September 9th, at which time (*i. e.*, September 9th) the proofs of loss were returned to its officers, and that, under the statute cited, action could not lawfully be commenced for 60 days more (*i. e.*, 120 days after September 9th). The circuit judge sustained this construction, but held that the defense was not admissible, under Cir. Ct. Rule 7, subdivision "*c*" of which provides that:

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"Whenever it shall be claimed in defense that any written instrument set forth in the plaintiff's declaration is void or voidable, or cannot be recovered upon, by reason of any statute, or by reason of nondelivery, failure of consideration, fraud, payment, discharge, or release, the facts upon which such defense is based shall be plainly set forth in a notice added to the defendant's plea."

See, also, 3 Comp. Laws, § 10074.

He also refused to permit an amendment, inasmuch as another action might be barred under the following clause in the policy:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

Counsel for the defendant maintain that the defense was admissible under the general issue, and that in any event the notice was good, because it apprised the plaintiff of the nature of the defense, which is all that the law requires of a notice.

We are of the opinion that the learned circuit judge placed the proper construction upon the statute, and that the action would not lie until the expiration of 120 days from the time that proofs of loss were filed, as the claim was not due, according to the terms of the policy, until 60 days expired after proofs of loss were furnished.

We also think a notice necessary, and that this defense could not be made under the general issue; but we are of the opinion that this notice was sufficient, when tested by the rule that a notice is sufficiently specific when it apprises the plaintiff of the defense relied upon. *Briesenmeister* v. *Knights of Pythias*, 81 Mich. 532 (45 N. W. 977). This notice stated that the suit was prematurely commenced; that he (plaintiff) had not complied with all of the conditions of the policy, and had not waited as long as the law required after the claim became due before commencing this action, according to the law governing the

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case. This was a statement of facts, and indicated an intention to rely upon the law and the policy in relation to the time when suit might be commenced.

It is contended by counsel for the plaintiff that the case of *First Baptist Church* v. *Insurance Co.*, 119 Mich. 203 (77 N. W. 702), sustains their contention as to the construction to be given the statute, viz., that it refers to the same 60 days mentioned in the policy, and it is said that such case is nearly on all fours with the present case. The policy explicitly fixes the period of 60 days after proof and appraisal as the time within which the loss shall not become due and payable, and the statute authorizes action only when payment has been withheld for more than 60 days after the loss becomes due. The case cited has not held to the contrary. In that case there was no notice of this defense, and, as we have already said, such notice was necessary. There was also a claim of waiver of that condition. The opinion does not state which ground the case turned upon. It is clear that it might have turned upon the want of notice of the defense.

It already appears that proofs of loss were furnished and received by defendant on July 11th. If it can be said that these were "satisfactory proof of loss," the 60 days began to run then. These proofs of loss seem to have complied with the requirements of the policy. An appraisal had previously been made by persons selected by the parties, and this had reached the defendant about May 22d. The defendant saw fit to claim that these proofs were not complete, because they did not contain the dimensions and materials entering into the buildings and additions in detail, and asked that these be supplied. While these were not necessary in the first instance, the defendant had a right to require them, under the terms of the policy. There was no undue delay in making such demand; the secretary having asked for this four days after he received the first proofs, *i. e.*, on July 15th. We consider the information a necessary part of the proofs of loss, when demanded seasonably, and must hold, therefore,

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as did the learned circuit judge, that the proofs of loss were not complete until September 9th, and it follows that the action was prematurely commenced. *Northwestern Mut. Life-Ins. Co.* v. *Greiner*, 115 Mich. 639 (74 N. W. 187).

We have no alternative but to reverse the judgment and order a new trial. It is so ordered.

The other Justices concurred.

ON REHEARING.

MOORE, J. This case was heard, and an opinion filed, which is reported *supra*. Afterwards a rehearing was ordered. A reference to the opinion which was filed will make a long statement of facts unnecessary here. The question in doubt is what construction shall be given to the word "due," as used in the statute. The claim of plaintiff is stated as follows:

"The policy became 'due' as soon as completed proofs of loss were filed, but not 'payable,' under the terms of the policy, until 60 days thereafter. In the statute the word 'due' is used, and the word 'payable' is not used. We contend that the word 'due' here is used as meaning 'owing' and 'remaining unpaid;' that as soon as a sum is fixed it is 'due,' although it may not be 'payable' until later. There is a distinction between the word 'due' and the word 'payable.' 'Due' means 'owing' and 'remaining unpaid.' *Fowler* v. *Hoffman*, 31 Mich. 219; *Smalley* v. *Ashland Brown-Stone Co.*, 114 Mich. 104 (72 N. W. 29)."

On the part of the defendant it is insisted that this position is erroneous, and that the claim was not due until it was payable.

The case is not free from difficulty. Not many cases have been adjudged which aid the court in arriving at a conclusion. After the opinion was filed in the case, our attention was called for the first time to two cases to which reference will be made later.

The defendant company is organized under Act No. 78,

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Pub. Acts 1883. The provision of the statute to be construed is found in section 10 of said act (2 Comp. Laws, § 7326), and reads:

"Suit at law may be prosecuted and maintained by any member against such corporations for claims which may have accrued, if payments are withheld more than sixty days after such claims shall have become due."

As early as 1849 the State of New York passed a law which had a provision essentially like the one contained in our statute. Laws N. Y. 1849, p. 448, chap. 308. This provision was construed by the supreme court of New York in 1853 in the case of *Utica Ins. Co.* v. *American Mut. Ins. Co.*, 16 Barb. 171. In that case the statute under which the defendant company was organized provided, among other things, that "suits at law cannot be maintained by any stockholder or member of the corporation for losses until payment shall have been withheld more than two months after such loss shall have become due." Section 16, Laws 1849, p. 448, chap. 308. It was claimed, as is claimed here, that the loss did not become due until 60 days after its amount had been determined, and that suit could not be brought until two months after the expiration of the 60 days. The court said:

"That section provides that the corporation may sue its stockholders, and that 'suits at law may be prosecuted by any stockholder, against such corporation, for losses which may have accrued (if payment is withheld more than two months) in all risks after such losses shall have become due.' The word 'due' has two meanings. The one indicates a debt ascertained and fixed, though payable *in futuro;* and the other, a debt where the money has become payable, so that a suit will lie on it presently. The first objection applies whenever a sum of money is due by a certain and express agreement, as by a bond for a determinate sum, a bill, a note, or a special bargain, or rent reserved on a lease; when the quantity is fixed and specified, and does not depend on any subsequent valuation to settle it. 2 Jacob, Law Dict. 198. This is in accordance with the old maxim, '*Debitum in præsenti, solvendum in futuro.*' The amount due in this case was

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settled by a resolution of the company on the 13th day of January, 1852, and the money declared to be payable in 60 days thereafter. This suit was not commenced till after the expiration of the said 60 days. This was right. It was not the intention of the act to give a further credit of 60 days after the expiration of the two months from the time when the proofs were received by the company, and the amount had been settled and allowed and fixed absolutely by the defendants. By that settlement, stated in the resolution of the 13th of January, 1852, the money became due by the true interpretation of the statute, payable in 60 days thereafter. Such, we think, is the true construction of this section."

The same question was discussed in *Allen* v. *Insurance Co.*, 19 Barb. 442, where the court used the following language:

"It was insisted upon the trial that the action had been commenced prematurely. The preliminary proofs were delivered on the 24th of July. The suit was brought on the 10th of November in the same year. By the terms of the policy, the loss was to be paid within 60 days after notice and proof thereof made by the assured in conformity to the conditions annexed to the policy. The loss became due immediately upon the happening of the fire, and would have been payable at once, but for this provision in the policy. By the 16th section of the general insurance act, under which the defendants were incorporated (Sess. Laws 1849, p. 448, chap. 308), suits at law may be prosecuted for losses if payment is withheld more than two months after such losses shall have become due. The defendants insist that the effect of this provision of the statute is to extend the credit to which they are entitled for the period of two months beyond that for which they had stipulated by the terms of their contract. But I do not so construe the statute. The loss became due when the property was destroyed, or, at any rate, when the requisite proofs were furnished. Without the statute, and had there been no stipulation in the contract to prevent it, a suit might have been commenced at once. But though due when the proofs were delivered, the statute had the effect to postpone the time of payment two months. It was then a debt, *debitum in præsenti, solvendum in futuro.* The defendants, without reference to the provision of the statute, saw fit to stipulate in their contract for a similar

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credit. Had they agreed to pay in 10 or 30 days after proof of loss, they might have been sued at the expiration of this period, notwithstanding the provision of the statute. The only effect of that provision is to fix the time within which the loss should be payable when the parties have omitted to do so by the terms of their contract."

This construction of the statute of New York, given to it in two cases before our statute was adopted, should have great weight, and a majority of the court think it should obtain in this case. We are of the opinion it was not the intention of the legislature that the company should have 60 days after satisfactory proof of the loss had been received before the loss should be payable, and, in addition thereto, that 60 days must elapse after the loss became payable by the terms of the policy before suit could be brought.

It is said by counsel that the case of *Utica Ins. Co.* v. *American Mut. Ins. Co.*, *supra*, is practically overruled by the later case of *Steen* v. *Insurance Co.*, 89 N. Y. 315 (42 Am. Rep. 297). We do not agree with this conclusion. In that case the question involved was, not that the suit was brought prematurely, but that it was brought too late. It was claimed that the suit must be brought within a year from the time of the fire, and the court held that the period of limitation did not begin to run until the loss was payable, and made use of the following language:

"The contract limits the time for bringing an action under or by virtue of the policy to a 'term of 12 months next after the loss or damage shall occur,' and declares that, 'in case any such suit or action shall be commenced * * * after the expiration of 12 months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed conclusive evidence against the validity of the claim thereby so attempted to be enforced, any statute of limitation to the contrary notwithstanding.' The validity of such a stipulation is well settled (*Wilkinson* v. *Insurance Co.*, 72 N. Y. 499 [28 Am. Rep. 166]; 2 May, Ins. § 478), and in this case the question is one of construction. What was the intention or understanding

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of the parties as to the time when the limitation should begin to run? The facts are undisputed, and the defendant's contention is that the words I have quoted are to be taken literally, and that they import a contract that no action shall be commenced after the expiration of 12 months from the happening of the fire by which the property insured was damaged or destroyed. On the other hand, the plaintiff has so far succeeded upon the ground that they relate to the time when a claim or cause of action accrues on which a suit may be maintained; that no claim accrues or arises in favor of the insured upon the mere happening of the loss, nor until 60 days after the proof required by the insurers, or provided for in the policy, should have been received by them at their office in New York, and the loss satisfactorily ascertained and proved.

"These events are made conditions, and are certainly precedent to the maintenance of an action, and we are of the opinion that they cannot be disregarded in getting at the true understanding of the parties of the meaning of the clause in question. Indeed, they seem to be the governing words of the contract. They are the words of the underwriters, intended for their protection, and qualify the general obligation to make good any loss, not exceeding the sum insured, or the interest of the assured in the property, by requiring preliminary proof, and a lapse even then of a fixed period before any cause of action can accrue. Except for these provisions, a suit would have lain upon the instant of the happening of the fire, or within a reasonable time thereafter.

"Now, if we look at the clause relied upon, we find the insurers prescribing a time after which no claim shall be brought, and a declaration that it shall not be sustainable unless commenced within 'the term of 12 months,' and a greater lapse of time is made 'conclusive evidence against the validity of the claim then attempted to be enforced.' It is plain that a 'term' or period is indicated after which the insurers shall not be liable, and the implied meaning of the same words must be that within that period they are or will be liable to an action. The law, in case of breach of contract, limits the time of bringing an action to six years. The contract substitutes 12 months. If we take the appellant's construction, the term of 12 months is at once narrowed to 10 months, for 60 days, at least, must elapse after 'a loss by fire' before any suit could be brought, and the term is subjected to such additional

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abatement as may be made necessary by alleged inadequacy of proof, or controversies between the insurers and the policy-holder before such loss is 'satisfactorily ascertained.' The delay incident upon such provisions is illustrated by a variety of cases heretofore considered by the courts, and, among others, *Ames* v. *Insurance Co.*, 14 N. Y. 253; *Mayor, etc., of New York* v. *Insurance Co.*, 39 N. Y. 45 (100 Am. Dec. 400); *Hay* v. *Insurance Co.*, 77 N. Y. 235 (33 Am. Rep. 607). These cases, in substance, hold that the time of limitation prescribed by such a contract does not commence running until the right to bring an action exists. Whether the delay is caused by extraneous circumstances, made effective by the insurer, as in the above cases, or by the provision of the policy giving time to the insurer before the lapse of which payment cannot be enforced, is immaterial. The delay in either case is caused by the insurer, and until, by the terms of the policy, a cause of action accrues, the period of limitation against its enforcement should not, in the absence of plain and unequivocal words requiring such a construction, be deemed to commence.

"Here, we think, the intention of the defendant was to give the insured a full period of 12 months, within any part of which he might commence his action; and having, by postponement of the time of payment, secured itself from suit, it did not intend to embrace that period within the term after the expiration of which it could not be sued. In other words, the parties cannot be presumed to have suspended the remedy and provided for the running of the period of limitation during the same time."

It will be seen this language is not inconsistent with the two cases cited, and it also disposes of the contention that to give the statute the construction we have given it will have the effect of depriving some other plaintiff of his remedy because he has not commenced his suit soon enough, though it was commenced within the time prescribed by the statute.

It is said that, as the defendant had 30 days after proofs of loss were received in which to elect whether it would repair, rebuild, or replace the property, or pay the money value thereof, until that time expired the plaintiff had no right to demand money damages, and, as this is a suit

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for money damages, it could not be brought until 60 days had expired after the 30 days for election had elapsed. We do not think there is force in this contention. Under the cases which we have cited, the loss becomes ascertained when satisfactory proof of loss is filed. It may be discharged by either electing within 30 days to repair, replace, or rebuild the property, or by paying the money value within 60 days.

We think the judgment should be affirmed.

CARPENTER and MONTGOMERY, JJ., concurred with MOORE, J.

HOOKER, C. J. (*dissenting*). Subdivision 1 of section 50 of the Compiled Laws of 1897 provides:

"All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

The statute applicable to this case must be construed according to the provision of subdivision 1 of section 50, quoted. The language of that statute is:

"Suit at law may be prosecuted and maintained by any member against such corporations for claims which may have accrued, if payments are withheld more than sixty days after such claims shall have become due." 2 Comp. Laws, § 7326.

It is said that, in one sense of the word "due," a claim is due when it accrues; but this is not the ordinary or natural sense. We would understand that, where one performs service for another under an express or implied contract, a debt or obligation at once accrues; but no one would think of saying it was due, until, by the terms of the contract, he had a right to demand it and expect payment. The policy in question expressly provides that the loss shall not become payable until 60 days after the notice of loss, etc., are served. Grant that the claim accrued

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when the loss occurred; it did not become due or payable, by the terms of the contract, until 60 days thereafter.

The statute itself recognizes the distinction between an accrued claim and a claim due. It authorizes a suit for a claim *accrued*, but requires that it be deferred 60 days after the *accrued* claim becomes *due*, not 60 days after the accrued claim *accrued*. In the face of this plain recognition in the statute of the difference between an accrued claim and a due claim, we should not construe the statute as though it read that suit might be brought on an accrued claim (though not due) after the expiration of 60 days after such accrued claim accrued. Such construction is equivalent to saying that suit may be brought 60 days after the loss, and therefore within a shorter period than the express contract of the parties permits, for the policy provides that the loss shall not be payable until 60 days after notice of the loss, and filing satisfactory proof of loss.

This would not be a very important question in this case, were it not for the fact that another action is barred by the stipulations of the policy. Had the action been commenced more than a year after the loss became payable by the terms of the policy, it would then become a question whether this statute would not save the case; and there would then be as strong an equity in favor of construing this law in accordance with the plain and ordinary meaning of its language as there is in this case to give to the same language a forced and unnatural meaning. No one doubts that words have different meanings, and, where it is apparent that it was so intended, an unusual meaning may be applied; but, under subdivision 1 of section 50, that can never be done when the intention is not to be discerned in the language used; and it is always dangerous to make the natural meaning yield to the exigencies of a particular case. We can see that applying the natural meaning to this statute will deprive the plaintiff of his remedy, if the defendant shall choose to make that defense. On the other hand, a different construction

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may deprive another plaintiff of his remedy because he has not commenced his suit soon enough, although it was commenced within the time prescribed by the plain provisions of the law. Neither the one consideration nor the other should have a feather's weight in determining how the rule laid down by the legislature at a time before any contract was made should be subsequently construed.

We have already held that where one assigned a policy to his wife, with the provision that, in case of her death before it came *due*, it should be payable to the heirs and assigns of the husband, and the wife died after the loss accrued through the death of the husband, but before it became payable according to its terms, the word "due" should receive the ordinary construction, and the heirs of the husband, and not those of the wife, were held entitled to the benefit. *Northwestern Mut. Life-Ins. Co.* v. *Greiner*, 115 Mich. 641 (74 N. W. 187). In that case we applied the law as laid down in subdivision 1, § 50, *supra*, and we have done the same in the original opinion in this case. We have the power to give this one construction in that case, and another in this; but the presumption should be that the legislature used the words in their ordinary sense, and meant what it said. So far as consistent, rules of construction should be adhered to, and not lightly set aside. Our law is a complex system, at best; and there is danger of going to the extreme of sacrificing uniformity and stability in definitions and rules to the possibilities of distinctions in the interest of real or imaginary justice. The safe rule is to accord to legislatures the credit of understanding and doing what they intend, and ordinarily courts should content themselves with enforcing their mandates so far as possible, and leaving to them the responsibility of correcting their mistakes, if they make any, and of intervening miscarriages of justice.

The case of *Utica Ins. Co.* v. *American Mut. Ins. Co.*, 16 Barb. 171, is at variance with the construction given to our statute in our former opinion. It is said that this case and another similar (see *Allen* v. *Insurance Co.*, 19

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Barb. 442) placed a construction upon this statute in New York before its adoption here, and that, under a well-understood rule, Michigan adopted the construction when it adopted the law. If this law were adopted from New York, of which I am not satisfied (and the language is not identical), it came to us without a construction by the court of last resort, and we owe this claim to the accident that unauthoritative decisions are reported in that State. These cases do not appear to have been reviewed, but they seem to be inconsistent with the case of *Steen* v. *Insurance Co.*, 89 N. Y. 315 (42 Am. Rep. 297). There it was held that a period of limitation did not commence to run until the loss became due and payable, notwithstanding the fact that the parties had stipulated that a right of action should be limited to 12 months next after loss or damage should occur. But, whatever we may think of the cases in Barbour, the rule invoked is not inflexible. On the contrary, its *binding force* has been wholly denied. See End. Interp. Stat. § 371.

It is said that the defendant may be held to have waived its statutory right by the stipulation in its policy. Did the policy clearly show an intention to waive its right to 60 days after the maturity of a claim before action could be brought, we might find it necessary to consider the question of waiver. But I am of the opinion that no such intention is fairly deducible from the policy. We feel free to deal with this question upon principle and our statute, which has prescribed a rule of construction.

The judgment should be reversed, as held in our former opinion.

GRANT, J., concurred with HOOKER, C. J.

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FIELD v. HOWRY.

1. BANKRUPTCY — DISCHARGE — FIDUCIARY RELATIONS — RECEIVERS.
One who is receiver of an insolvent's estate holds its funds in a fiduciary capacity, within the meaning of section 17 of the bankruptcy law of 1898, providing that a discharge shall release a bankrupt from all provable debts, except such as were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in a fiduciary capacity.

2. SAME — MISAPPROPRIATION OF FUNDS.
A receiver of an insolvent estate, who loaned the funds of the estate to a firm of which he was a member, misappropriated the funds, within the meaning of said section 17 of the bankruptcy act, even though he did not intend to convert the money to his own use.

3. SAME — DEBT CREATED BY MISAPPROPRIATION.
A receiver who loans trust funds to a firm of which he is a member, and takes notes which are a valid claim against his copartners, cannot maintain that his discharge in bankruptcy is a release, on the ground that the debt is not one created by a misappropriation of trust funds.

4. SAME — MORTGAGE FORECLOSURE — DECREE FOR DEFICIENCY.
A discharge in bankruptcy is no more a defense to a petition for a personal decree for a deficiency after mortgage sale, where the mortgage was given to secure the loan of trust funds misappropriated by the defendant, than it would be in a proceeding brought against him in his fiduciary capacity.

5. SAME — WAIVER BY PRESENTING CLAIM.
One who presents a claim against a bankrupt's estate for a debt created by a misappropriation of trust funds does not thereby waive the right to proceed against him in a subsequent suit, since the bankruptcy act denies the efficacy of a discharge in case of such a debt.

6. MORTGAGE FORECLOSURE — PERSONAL DECREE — DEFICIENCY — PRACTICE.
Where the original decree on the foreclosure of a mortgage determined the amount due, that defendant, among others, was primarily personally liable, directed a sale in case of nonpayment, and that any deficiency be reported, leaving open

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the question of defendant's rights under a discharge in bankruptcy, defendant could not resist a petition for a personal decree for a deficiency against him on the ground that his liability therefor was not determined by the original decree.

Appeal from Saginaw; Snow, J. Submitted December 5, 1902. (Docket No. 44.) Decided April 14, 1903.

Petition by Asa W. Field, receiver of the estate of George B. Wiggins, insolvent, against John W. Howry, John H. Howry, and H. Kirk Howry, for a deficiency decree after a foreclosure sale. From a decree against defendant H. Kirk Howry alone, he appeals. Affirmed.

Humphrey & Grant, for petitioner.

Weadock & Purcell, for appellant.

HOOKER, C. J. In November, 1894, George B. Wiggins, being insolvent, conveyed all of his property to H. Kirk Howry and Stephen L. Wiggins in trust for creditors, with preferences. Subsequently this was decreed to be an assignment for the benefit of all creditors, without preferences, at the suit of a dissatisfied creditor, and Stephen L. Wiggins and H. Kirk Howry were appointed receivers. The property was already in their possession as trustees under the assignment first mentioned. During all of this time a firm known as J. W. Howry & Sons was in existence. It was engaged in the business of lumbering, and was composed of John W. Howry and his sons, John H. Howry and the aforesaid H. Kirk Howry.

The receivers converted Wiggins' property into money, and from time to time put it in bank in the name of one or both of them. It was not allowed to remain there long, and substantially all of the net proceeds was loaned to the firm of J. W. Howry & Sons. Wiggins appears to have had little to do with the matter, but consented to the loan. The firm gave its six promissory notes for the money loaned. The first was for $7,500, dated May 4, 1895, while H. Kirk Howry and Wiggins were acting as trus-

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tees. The others were made while they were receivers. The last note was dated June 1, 1896, and they aggregated $18,100, drawing 6 per cent. interest. No interest was ever paid, and renewals were not given. Defendant says this was because the money was subject to call. No creditor of Wiggins ever received any portion of his claim, and the loans were made without any authority of court, and no report of such loans was made to the court until after J. W. Howry & Sons became insolvent, which occurred in July, 1896, when they suspended payment of their obligations. At this time said firm was indebted to one Grace H. Howry. On July 13, 1896, John W. Howry gave two mortgages upon property belonging to him to the receivers.

The court which had appointed the receivers required them to file an account, and a hearing and examination of them was had, which resulted in the resignation of Wiggins and the removal of H. Kirk Howry, and the appointment of Asa W. Field as their successor, and the notes and mortgages were turned over to him. The mortgages were foreclosed, and a decree was made adjudging that there was due to the complainant upon the notes and mortgages the sum of $22,170.41, and that John W., John H., and H. Kirk Howry were *primarily* liable for the payment thereof. The decree provided for a sale of the premises, and reserved, in express language, the right of the three Howrys, and each of them, to make the defense of discharge in bankruptcy in any proceedings that might thereafter be taken to enforce any deficiency that should be reported. The property was sold, and a deficiency of $14,082.20 resulted.

In January, 1900, a petition was filed by the new receiver, asking a decree against the three Howrys for this deficiency. The case was begun before this court upon a preliminary question, and is reported as *Field* v. *Saginaw Circuit Judge*, 124 Mich. 68 (82 N. W. 798). A hearing has been since had in the circuit court, where it was shown that all of the Howrys had been through bankruptcy, and

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that their discharge had been ordered. It was decreed that the defendants John W. and John H. Howry were thereby discharged from this obligation, but that the liability of H. Kirk Howry arose from a misappropriation of a trust fund, and that the discharge in bankruptcy did not discharge him from such liability; and a decree was accordingly entered against him, from which he has appealed.

The liability adjudged in the foreclosure case arises upon contract, viz., the notes. The defendant H. Kirk Howry was a joint maker of these, and, while he did not join in giving the mortgages, they were given to secure the debt, and it was proper that he be made a defendant, and adjudged primarily liable to pay the decree. He thereby became subject to further proceedings to collect the deficiency, which should be decreed against him, unless he can show a reason to the contrary. This he attempts by showing his discharge in bankruptcy, and that is sufficient if his only liability is that of maker of the notes in question. The evidence clearly shows, however, that he diverted his trust fund from a proper use, and himself became the borrower of it conjointly with his copartners, without authority to do so from the court, whose officer he was, and in whose custody the fund was, in contemplation of law. He has had a full hearing upon the merits of this question, and that is the conclusion reached by the learned circuit judge upon the questions of fact, and in that conclusion we concur.

This leaves only some legal questions upon which the case must turn:

1. Was this such a misappropriation as to deprive him of the benefit of his discharge?
2. If so, was any right lost to the petitioner through the presentation of the claim by the receiver against the estates in bankruptcy of John W., John H., and H. Kirk Howry?
3. Is the fact that this proceeding rests upon a foreclosure suit, instead of being an action brought directly to recover for the misapplication of the fund, an obstacle to a decree for the deficiency?

Section 17 of the bankruptcy law of 1898 (U. S. Comp.

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Stat. 1901, p. 3428) provides that a discharge in bankruptcy shall release a bankrupt from all his "provable debts," except such as "* * * were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." We have no difficulty in reaching the conclusion that H. Kirk Howry, the appellant, received and held the funds in a fiduciary capacity, whether he received and held them as trustee under the assignment, or receiver appointed by the court. We think this is settled by the federal cases reviewed in our own case of *Bryant* v. *Kinyon*, 127 Mich. 152 (86 N. W. 531), where this statute was under consideration.

His counsel contend that the loaning of the fund to Howry & Sons was not a misappropriation, within the meaning of that statute; and they invoke the rule of *ejusdem generis* in support of the claim that, to be within the exception of the statute, the misappropriation must be an intentional and wrongful, if not criminal, misappropriation. It is forcibly urged that embezzlement and defalcation involve moral turpitude, as also does fraud, and that this fact explains and limits the sense in which the term "misappropriation" was used. We find it unnecessary to decide this question, further than to say that, in our opinion, such exception should not be restricted to criminal conduct. The use of the word "fraud" forbids that. Although the defendant testified that he had no intent to wrong the estate, and expected that the firm of which he was a member would pay its obligation, and he was anxious to increase the fund in his charge, the testimony shows that he intentionally applied the fund to an unauthorized purpose of his own, and concealed such use from the court as long as possible. We are justified in finding that he knowingly and wrongfully misappropriated the fund, though he may have expected that it would not be lost, and this brings the case within the exception in the statute. It is not necessary that he should have intended to convert the money to his own use, and deprive

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the *cestuis que trustent* of the same *altogether*. We accept with much doubt the testimony that the firm was worth more than a million of dollars when this loan was made, and incline to the opinion that it was in straits for money, and that, like many other misguided men, this defendant yielded to the urgency of his necessities, and used this trust fund in the hope, and perhaps expectation, that it would be replaced, but with the knowledge, nevertheless, that it was a wrongful and unauthorized use. This act was not so colored by an agreement to pay interest and the subsequent giving of security (that has since proven inadequate) as to take away its apparent culpability. So such a conversion is wrongful. See *People* v. *Butts*, 128 Mich. 208 (87 N. W. 224); *Tindall* v. *Westcott*, 113 Ga. 1114 (39 S. E. 450, 55 L. R. A. 225); Smith, Rec. § 6*c*.

Counsel raise the point that this is not a debt created by misappropriation, but is a loan evidenced by a contract between the receiver, who accepted, and Howry & Sons, who gave, notes. When H. Kirk Howry wrongfully parted with this fund, he became indebted to the *cestuis que trustent*, and he is none the less so because he and his copartners expressly recognized an indebtedness. It was a debt created by his misappropriation, notwithstanding the existence of a valid claim against his copartners in the same connection. He cannot avoid the consequences of this exception by taking a note for the amount misappropriated, or by giving and receiving his own note; and his successor is not called upon to split hairs, or lose a security for the fund by electing to treat the firm note and mortgage as void. He received this claim and the paper from this defendant officially, and may make the most he can from them.

The case of *Township of Madison* v. *Dunkle*, 114 Ind. 262 (16 N. E. 593), is in point. There a township trustee wrongfully appropriated funds to his own use while in office, and gave to his successor his note for the amount due the township. An action was afterwards brought by

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the township against the defaulting trustee, who set up the claim that the giving and accepting the note relieved the debt of its fiduciary character, and that it was therefore barred by the discharge in bankruptcy. The court said:

"This position cannot be maintained. The execution of the note did not change the character of the debt. The note is not the debt; it is a mere evidence of the debt. * * * The appellee was indebted to the township because he had, in direct violation of law, converted money intrusted to him as a public officer. He did not owe the township simply because he had executed a promissory note to its trustee, but because he had violated the law, and converted the money belonging to the township. It is well settled that the courts will look behind a note, a mortgage, or even a judgment, to ascertain the nature of the debt, and, if it is ascertained to be one which a discharge does not bar, it will be so adjudged."

See, also, *Howland* v. *Carson*, 28 Ohio St. 625; *In re Rhutassel*, 96 Fed. 597.

It is contended that this is not a proceeding in which the complainant can proceed against him, because it is not brought against him in his fiduciary capacity. The law (section 17) is not restricted in its operation. It only says, in effect, that, when one is sued on a debt that was created by his misappropriation of a trust fund, he cannot be permitted to effectively interpose his discharge in bankruptcy. He is sued on such a debt, not as a trustee, but personally, and his liability is personal. He does not interpose his discharge in the capacity of trustee, but as a personal protection. The only question here is whether it is a shield, and can protect him against his personal obligation. The law says it cannot, and we think it makes no difference whether it is interposed in an action of *assumpsit* on the liability incurred by the act—*i. e.*, the obligation implied, or an express promise based upon it—or in an effort to collect a deficiency growing out of the proven inadequacy of security given to and accepted by him to secure such obligation. The discharge is elimi-

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nated from the case when it appears that the debt was created by the misappropriation of money.

A further point is made in this connection. The petitioner proved his claim against the estate of the bankrupts in the bankruptcy proceedings, and it is said that by so doing he has elected to treat it as an ordinary debt, rather than a fiduciary obligation, and waived the right to question the discharge. We are cited to Bump, Bankr. (11th Ed.) p. 691, and *Chapman* v. *Forsyth*, 2 How. 208, in support of this contention, though it is admitted that the claim is disputed in Love. Bankr. § 293. We do not discover that the citation from Bump throws light upon the question. While the case in Howard held that, under an early act, the court had no jurisdiction over such claims, it also held that, if the creditor saw fit, he might waive his privilege by allowing it to be treated as a claim within the jurisdiction of the court, and that by so doing, and receiving a dividend thereon, he was precluded from afterwards questioning the discharge. But section 17 of the act of 1898 denies the efficacy of a discharge in certain classes of *provable* claims; and the law of 1867, § 5117 (see Bump, Bankr. 691), allowed such a claim to be proved, and applied the dividend on the account, without the attending consequence of waiver mentioned in *Chapman* v. *Forsyth*.

It is said that a personal decree was not rendered against H. Kirk Howry. We have already sustained these proceedings so far as they had then gone in the case of *Field* v. *Saginaw Circuit Judge*, 124 Mich. 69 (82 N. W. 798). We held in that case that an original decree in a foreclosure case might find a personal liability. The original decree found the amount due upon the notes and mortgages, and adjudged that this defendant and his copartners *were* primarily personally liable for the payment thereof, and that, unless they pay it, the premises should be sold, and that the deficiency should be reported. It is now said that this did not determine that defendants were liable for the deficiency. This is true, and the decree shows that the

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words used were designed to leave open the question of defendants' rights under their several discharges in bankruptcy. We said in the case cited that it is competent, in a proper case, to determine the question of personal liability for a deficiency, and that such a decree would be final, but that the amount of the deficiency would have to be determined, and that, as the case then appeared, such was the object of the petition. By the express provisions of the decree, the bankruptcy question was reserved, with a view to its presentation on the application. We see no objection to this practice that the defendant can complain of.

The decree is affirmed, with costs.

The other Justices concurred.

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ROBINSON v. UNITED STATES BENEVOLENT SOCIETY.

1. INSURANCE—LOCAL AGENT—DELIVERY OF POLICY.
   The local agent of an accident insurance company, to whom a policy is sent to be delivered to the applicant, is not the agent of the insured in receiving the policy, so as to effect a valid contract of insurance inconsistent with the terms of the application.

2. SAME—APPLICATION—CONTRACT—POLICY.
   Where an application for insurance provided that the contract should be complete when it was received at the company's office and accepted by its secretary, the application and its acceptance formed the contract until the policy was issued and received in its stead.

3. SAME—WAIVER.
   A person whose application for insurance is received and accepted by the company cannot be bound by a policy issued and sent to the local agent for delivery, and containing provisions inconsistent with the application, until he has had an opportunity to ratify or waive the inconsistent provisions.

4. CONTRIBUTORY NEGLIGENCE—VESTIBULE TRAIN—OPEN DOORS.
   A person who, in passing from his car to the dining car on a

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vestibule train, fell from the platform through an open vestibule door, was not guilty of contributory negligence, in the absence of any showing that he knew or should have known the door was open.

Error to Saginaw; Beach, J. Submitted February 18, 1903. (Docket No. 96.) Decided April 14, 1903.

Assumpsit by Rosa H. Robinson against the United States Benevolent Society on a contract of accident insurance. From a judgment for plaintiff on verdict directed by the court, defendant brings error. Affirmed.

On Friday, June 29, 1900, one Samuel Robinson, Sr., made a written application to the defendant for an insurance policy. He resided at Charlotte, Mich. The defendant's local agent at Charlotte was one Wilcox, who solicited the insurance and received the premium. Mr. Robinson was to start the following Monday morning, July 2d, for Kansas City, Mo., and this application was made in contemplation of that journey. The material portions of the application read as follows:

"I hereby apply for insurance in the above-named society under classification AA, accident monthly indemnity, $100; accidental death indemnity, $1,000; loss of any two limbs or both eyes, $1,000; loss of one limb, $500; sick monthly indemnity after first week, $60, covering sickness originating after three months' continuous membership. This application to be based upon the following statements of facts, which I hereby warrant to be true and complete, and is subject to the conditions of the certificate, which I agree to accept, and make the monthly payment of $3.00 on or before the first day of each month hereafter in advance. * * *

"In case of death by accident, my beneficiary shall be Rosa H. Robinson; relationship, wife; residence, Charlotte, Mich. * * *

"I hereby agree that any statement made by me to the solicitor of this application, or by the solicitor to me, shall not bind the society unless written hereon; that this application shall not be binding upon the society

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until accepted by the secretary; and that the certificate shall not be in force until actually issued from the office in Saginaw, Mich."

At the bottom of this application, and after Mr. Robinson's signature thereto, appears the following:

"Witnessed and recommended by F. L. Wilcox, agent.
"Send policy to F. L. Wilcox at Charlotte, Mich."

Mr. Wilcox forwarded the application to the home office, and on it was written:

"Approved and accepted 12 m., June 30, 1900.
"Certificate number 119,524.

"J. B. PITCHER,
"Secretary."

Mr. Wilcox received the policy from the home office on the morning of July 2d, but after Mr. Robinson had left on his journey, and then delivered it to Mr. Robinson's son, who at noon took it to his father's home, and left it on the sideboard. The policy contained the following provision, which is not found in the application:

"If death shall result within three months from date of accident, and solely from accidental injuries, as specified in clause first hereof, received after this certificate has been in full force and effect, without delinquency, for three consecutive months immediately preceding the happening of such accident, the society will pay $1,000 to Rosa H. Robinson (wife), if surviving, otherwise to the executors, administrators, or assigns of the assured."

Mr. Robinson took a vestibule train from Chicago to Kansas City on the evening of July 2d, and, while passing from his sleeper to the dining car, was thrown from the train through one of the side vestibule doors which was open, and was killed. The evidence for the plaintiff showed that the night was very warm and dark, and that the side doors were left open. Plaintiff's original declaration was based on the policy. Her amended declaration was based on the application and its acceptance. The court directed a verdict for the plaintiff.

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McKay & McKay, for appellant.

Knight & McAllister, for appellee.

GRANT, J. (*after stating the facts*). 1. Mr. Wilcox, the local agent of the defendant, was not the agent of Mr. Robinson in receiving the policy, so that it, differing from the terms of the application, became binding upon Mr. Robinson without the opportunity to know its contents and ratify the provisions which are inconsistent with the terms of the application. The policy was sent to Mr. Wilcox for delivery to Mr. Robinson. The former so understood, and immediately sought the latter in order to deliver it. Finding that he had gone, he delivered it to the son. The contention that under these circumstances the agent of the defendant became the agent of the insured in receiving the policy, so as to effect a valid policy different from the one applied for, finds no support in authority or reason. Even an express stipulation that the agent of the company shall be deemed the agent of the insured would not change the legal status. 16 Am. & Eng. Enc. Law (2d Ed.), 909, 910.

2. Defendant concedes a contract of insurance, and insists that it is found in the certificate or policy issued by it and sent to its agent, Wilcox. Plaintiff insists that this certificate or policy differed from the application, and was not binding upon the deceased until he had notice of its provisions inconsistent with the application, and had expressly or impliedly ratified them, and that the application and its acceptance constitute the contract. The record discloses that this application was made in anticipation of a journey, to be commenced by Mr. Robinson three days thereafter. It was so understood by the agent. The premium was paid, forwarded, and received at the defendant's home office. The application expressly provides that the contract of insurance should be complete the moment that it (the application) was received at the company's office and accepted by its secretary. The application and its acceptance formed the contract until the

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certificate or policy was issued and received in its stead. In insurance contracts of this character it is the duty of the company to act with reasonable promptness. Failing to reject within reasonable time, the law implies an acceptance. Mr. May states the rule as follows:

"If an application sent on approval is actually accepted by the company at its home office, though no notice of acceptance is given to the insured, and afterwards rejected only because the premises burned before a policy was made out, the company is bound." 1 May, Ins. (4th Ed.) § 54*c*.

A similar case to this is that of *Preferred Accident Ins. Co.* v. *Stone*, 61 Kan. 48 (58 Pac. 986). The application contained the stipulation that it should not be binding upon the company until accepted by the secretary, and that the policy should not be in force until actually issued from the office. The premium, as in this case, was paid to the agent, but the agent did not remit it to the company. The applicant in that case, as in this, applied for insurance in contemplation of a journey. The insured met with an accident before the policy was delivered. The only difference between the facts of that case and this is that the agent falsely stated to the insured that he had heard from the company, and that his application had been accepted. The court said that the payment of the premium to the agent was the same as paid to the company, and that:

"It could not lawfully retain the premium and hold the application in abeyance. The retention of the premium and its failure to reject the application, its holding of it while it took time to adjust a matter of concern only to itself, were tantamount to an acceptance of the application and an agreement to issue the policy."

A party applied to the local agent of a fire-insurance company for a policy on personal property, and the agent said he would write it and report it, but doubted whether the company would carry it. The agent did not write or report the risk. The property was destroyed by fire, and

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it was held that the contract of insurance was effected. *Campbell* v. *Insurance Co.*, 73 Wis. 100 (40 N. W. 661).

An application for a policy of life insurance was made, and a receipt given by the agent, containing a stipulation that the company should not be liable until the policy was delivered to the applicant while in good health. The application was received, policy written, and sent to the company's agent for delivery, but was never delivered. The company was held liable upon the principle that the unconditional written acceptance of the application consummated the contract. *New York Life-Ins. Co.* v. *Babcock*, 104 Ga. 67 (30 S. E. 273, 42 L. R. A. 88, 69 Am. St. Rep. 134). See, also, *Continental Ins. Co.* v. *Haynes*, 10 Ky. Law Rep. 276, and *Hartford Fire-Ins. Co.* v. *King*, 106 Ala. 519 (17 South. 707).

If it should be held that the sending of the certificate or policy to Wilcox, defendant's agent, was equivalent to delivery to the insured,—and there are authorities which so hold,—then the case comes within *Dailey* v. *Accident Ass'n*, 102 Mich. 290 (57 N. W. 184, 26 L. R. A. 171). The duty of the defendant was to issue the policy in compliance with the terms of the application. If it chose to insert inconsistent provisions, it was its duty to call the attention of the insured to them, so that he might accept or refuse the policy. The insured has the right to assume that his policy will be in accordance with the terms of his application, and he cannot be bound by a different policy until he has had the opportunity to ratify or waive the inconsistent provisions. See, also, *Gristock* v. *Insurance Co.*, 87 Mich. 428 (49 N. W. 634), and authorities there cited.

3. It is urged that Mr. Robinson was, under the undisputed facts, guilty of contributory negligence in passing from his car to the dining car while the train was running at full speed. Counsel cite and rely upon *Sawtelle* v. *Assurance Co.*, 15 Blatchf. 216 (Fed. Cas. No. 12,392). The train in that case was not a vestibule train, and the deceased was either riding upon the platform or passing

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from one car to another. In a vestibule train there is no more danger in passing from one coach to another than in passing from one seat to another in the same car. Dining cars are attached, and one of the purposes of the vestibules is to make it safe for passengers to pass from car to car. Mr. Robinson had the right to assume that the vestibule doors were closed, and that it was safe for him to pass through. If the railroad company had removed these safeguards, it was incumbent upon defendant to show that Mr. Robinson either knew or should have known it. It failed to make any such showing. The railroad company had made the means of passage safe, and invited him to pass, and he was not negligent in accepting the invitation. *Bronson* v. *Oakes*, 22 C. C. A. 520, 76 Fed. 740; *Marquette* v. *Railroad Co.*, 33 Iowa, 562.

Judgment affirmed.

MOORE, CARPENTER, and MONTGOMERY, JJ., concurred. HOOKER, C. J., did not sit.

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ACCORD AND SATISFACTION.

1. An unliquidated demand can be satisfied by the payment of an amount smaller than its actual value. *Wheeler* v. *Baker*, 507.

2. A creditor who, in settling the amount of a disputed claim, agrees with the debtor upon a certain sum, and as a part of the agreement accepts a less sum in full payment, discharges the whole demand. *Id.*

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ACKNOWLEDGMENT—See DEEDS (3).

ACTIONS.

Where plaintiff and her husband, each owning individual interests in property, conveyed it to defendant upon an agreement that he should dispose of it and pay one-half of the proceeds to them, the contract was joint on the part of plaintiff and her husband, and, upon the latter's death, she could not bring suit for a part of the proceeds without joining with the representative of her husband's estate. *Blackburn* v. *Blackburn*, 525.

See FIRE INSURANCE; LANDLORD AND TENANT (2); PLEADING; TROVER.

ADMISSIONS.

1. The uncontradicted testimony of a witness that defendant's testatrix told her that she had purchased notes of claimant, and given her own notes in payment, is sufficient to establish such fact. *Crampton* v. *Newton's Estate*, 149.

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ADMISSIONS—Continued.

2. The affidavit of a party to a suit, and that of his solicitor, made at his request, and filed in the cause, may be used as an admission against the party in another suit. *Cornelissen* v. *Ort*, 294.

3. A party relying upon the admissions of the opposite party to prove a material fact is not concluded by the explanations and statements made at the same time as the admissions. *Detroit Electric Light & Power Co.* v. *Applebaum*, 555.

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AMENDMENTS.

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APPEAL AND ERROR.

1. Rulings on the admission of testimony will not be reviewed in the absence of objections or exceptions, or on other objections than made in the court below. *McCormick* v. *Olbinski*, 30.

2. The admission of immaterial testimony that could not have affected the result is not reversible error. *Id.*

3. A judgment for defendant will not be set aside where it appears that plaintiff is entitled to no more than nominal damages, and a judgment in his favor would not carry costs. *Wilcox* v. *Morton*, 63.

4. In a chancery case, where the question is a doubtful one, the Supreme Court will give great weight to the findings of the circuit court on questions of fact, but will examine the case *de novo*, and, if satisfied that a different conclusion should have been reached, will reverse the decree. *Lowry* v. *Paw Paw Sav. Bank*, 228.

5. A point not raised by an assignment of error will not be considered. *Morin* v. *Robarge*, 337.

6. A decree of the circuit court for complainant on a partnership accounting will not be decreased because of an error in giv-

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APPEAL AND ERROR—Continued.

ing complainant a credit, which is more than offset by an excessive credit to defendant, due to a concession based upon a mistaken computation, though complainant has not appealed. *Snyder* v. *O'Beirne*, 340.

7. A decree will not be increased in amount in favor of a party who has not appealed. *Id.*

8. An assignment of error that "the court erred in admitting improper evidence to go to the jury on the part of the plaintiff" does not comply with the rules, and will not be considered. *O'Neil* v. *Newman*, 489.

9. A party who does not object to the admission of a deed in evidence because it was acknowledged before an interested notary cannot raise the question on appeal. *Schwartz* v. *Woodruff*, 513.

10. Where, in a case which has been reversed and a new trial had, the record discloses no different questions or evidence than upon the first trial, the former decision is the law of the case. *Fitzgerald* v. *City of Benton Harbor*, 645.

See DIVORCE (2); EQUITY PRACTICE; LIBEL AND SLANDER (1); NEW TRIAL; PARTITION (1); STARE DECISIS; TAXATION (6, 8).

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ASSAULT.

A person charged with assault and battery, who claims to have acted in self-defense, may show that on the previous day the complaining witness made an assault upon him for the same cause, as tending to justify a belief that he was in the act of commencing another assault. *People* v. *Tillman*, 23.

ASSIGNMENT OF CLAIM—See MECHANICS' LIENS (4).

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ASSUMPTION OF RISK—See MASTER AND SERVANT (2, 5, 6, 8, 9, 11).

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ATTORNEY AND CLIENT.

1. Plaintiff brought an action against three attorneys for negligence in not perfecting an appeal in a chancery suit. On a motion to extend the time for taking the appeal, he filed an affidavit by himself, as well as one by his solicitor, showing that he relied upon the solicitor to perfect the appeal, and not upon the two who were employed as counsel. *Held*, that a verdict of not guilty in favor of the two who were employed as counsel was justified by the evidence. *Cornelissen* v. *Ort*, 294.

2. In an action against an attorney for negligence in not perfect-

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ATTORNEY AND CLIENT—Continued.

ing an appeal in a chancery suit, evidence of the amount involved in the suit and the costs paid by reason of the decree does not overcome the presumption of the validity of the decree, and, without further proof being offered, is inadmissible. *Id.*

3. Whether, in an action against an attorney for negligence, after negligence has been shown, it is incumbent upon him to show that the client has not been injured by reason of the negligence,—*quære*. *Id.*

See DIVORCE (2).

BAILMENTS.

A bailee of property has no apparent authority to sell, and devest the owner of his property. *Nichols* v. *Monjeau*, 582.

See ESTOPPEL (3).

BANKRUPTCY.

1. One who is receiver of an insolvent's estate holds its funds in a fiduciary capacity, within the meaning of section 17 of the bankruptcy law of 1898, providing that a discharge shall release a bankrupt from all provable debts, except such as were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in a fiduciary capacity. *Field* v. *Howry*, 687.

2. A receiver of an insolvent estate, who loaned the funds of the estate to a firm of which he was a member, misappropriated the funds, within the meaning of said section 17 of the bankruptcy act, even though he did not intend to convert the money to his own use. *Id.*

3. A receiver who loans trust funds to a firm of which he is a member, and takes notes which are a valid claim against his copartners, cannot maintain that his discharge in bankruptcy is a release, on the ground that the debt is not one created by a misappropriation of trust funds. *Id.*

4. A discharge in bankruptcy is no more a defense to a petition for a personal decree for a deficiency after mortgage sale, where the mortgage was given to secure the loan of trust funds misappropriated by the defendant, than it would be in a proceeding brought against him in his fiduciary capacity. *Id.*

5. One who presents a claim against a bankrupt's estate for a debt created by a misappropriation of trust funds does not thereby waive the right to proceed against him in a subsequent suit, since the bankruptcy act denies the efficacy of a discharge in case of such a debt. *Id.*

See CONSIDERATION (1); VENDOR AND PURCHASER (8).

BANKS AND BANKING.

1. A holder of bank stock, who was indebted to the bank, desiring to qualify himself for the office of State Bank Commissioner, transferred his stock to his wife, who gave the bank her note

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BANKS AND BANKING—Continued.

in reduction of his indebtedness. He ceased to be an officer, and she was elected a director. *Held*, that none of the three parties could maintain that the transaction was merely colorable and void. *Just* v. *State Sav. Bank of Ionia*, 600.

2. A by-law of a bank, forbidding a transfer of stock by one who is indebted to the bank without the consent of the board of directors, does not invalidate a transfer of stock by such debtor, where the purchaser assumes the debt, and the board, without questioning the validity of the transfer, recognizes it by electing the purchaser a director. *Id.*

3. Neither a by-law of a bank nor an agreement between the bank and a stockholder, that the bank shall have a lien on the stock for the amount of the stockholder's indebtedness not then due, is binding upon *bona fide* pledgees of the stock for value. *Id.*

4. A bank stockholder gave her note to the bank, and then pledged her stock for her husband's debt to another bank. The latter bank gave the first bank notice of the pledge. The first bank claimed a lien on the stock to secure the note by virtue of a by-law and an agreement with the stockholder. The second bank had no knowledge of either agreement or by-law. *Held*, that the first bank could not assert a prior lien. *Id.*

5. A *bona fide* purchaser or pledgee of bank stock for value does not take it subject to the bank's lien under 2 Comp Laws, § 6098, for a debt subsequently falling due, where the bank has notice of the purchaser's or pledgee's rights. *Id.* 601.

6. Circumstances sufficient to put a prudent man on inquiry are insufficient to charge a bank with knowledge that a check deposited in the usual course of business by another bank was received by the latter when insolvent; there must be such evidence as to show bad faith. *Glines* v. *State Sav. Bank*, 638.

7. Where, in an action by the depositor of a check in an insolvent bank against a bank which had received it from the former bank, and paid out its proceeds on checks, there was no evidence that defendant did not act in good faith, a verdict should have been directed for defendant. *Id.*

See GIFTS (2); INTEREST.

BENEFIT SOCIETIES.

1. Where a man and woman lived and cohabited together as husband and wife in good faith, under the mistaken belief that she was divorced from her husband, and the man obtained a certificate of insurance in a mutual benefit association whose by-laws provided that payment should be made to the wife, husband, children, dependent, mother, etc., of a member, at his death the insurance should be paid to her, rather than his mother, who, with full knowledge of the facts, had for 18 years treated them as husband and wife. *Supreme Tent K. O. T. M.* v. *McAllister*, 69.

2. It is not contrary to public policy to permit mutual benefit

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BENEFIT SOCIETIES—Continued.

associations to issue policies in favor of those who live and cohabit together in the honest belief that they are husband and wife, although one of them may have been married before and not legally divorced. *Id.* 70.

3. Where a mutual benefit association, whose constitution provided that a beneficiary might be changed upon a surrender of the certificate, waived such surrender (because the beneficiary, having possession, refused to return it), and, at the request of the member, issued another in its stead for the benefit of another person, the beneficiary in the first certificate, who had made no payments thereon, could not recover from the association upon the death of the member. *Allgemeiner Arbeiter Bund* v. *Adamson*, 86.

BIDDING—See MUNICIPAL CORPORATIONS (21-23).

BILLS AND NOTES.

1. In an action on a promissory note against the maker and indorser, an instruction which assumes that the defendants are sued as joint makers is erroneous. *June* v. *Labadie*, 135.

2. Parol evidence is admissible to prove that a promissory note, unconditional in terms, was placed in the hands of the payee with the understanding that it should not become a binding obligation until the happening of some event. *Central Sav. Bank* v. *O'Connor*, 578.

3. Parol evidence is inadmissible to introduce conditions or modifications of the terms of a promissory note which has been delivered into the hands of the payee, to take effect presently as the obligation of the maker. *Id.*

4. In an action upon a note unconditional in terms, given for the purchase price of a chattel mortgage and note, evidence is inadmissible to show that it was given with the understanding that it should become void if the maker of the chattel mortgage should be declared a bankrupt. *Id.*

See BANKS AND BANKING (6, 7); CONSIDERATION (1); MARRIED WOMEN (2-4); VENDOR AND PURCHASER (9).

BILLS IN AID OF EXECUTION—See EQUITY JURISDICTION (10); HUSBAND AND WIFE (1); RES JUDICATA.

BILLS OF PARTICULARS.

1. In an action of criminal conversation, a circuit judge may, in his discretion, require the plaintiff, whose declaration is general, to furnish a bill of particulars, specifying the particular place and date of each alleged act of intercourse. *Gary* v. *Eaton Circuit Judge*, 105.

2. Where a declaration on a foreign judgment, containing also the common counts, was amended without leave, after the time for amending without leave, by filing a declaration like the former, except that it contained a notice that certain promissory notes would be given in evidence, and on the same

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BILLS OF PARTICULARS—Continued.

day a bill of particulars was filed, pursuant to defendant's demand, referring to the amended declaration for a description of plaintiff's cause of action, it was not error to treat the amended declaration as a part of the bill of particulars. *Ontario Powder Works* v. *Powell*, 451.

BOARDS OF HEALTH—See PUBLIC HEALTH.

BOARDS OF REVIEW—See TAXATION (14).

BOARDS OF SUPERVISORS—See BRIDGES.

BONA FIDE PURCHASERS—See BANKS AND BANKING (3–5); CONSIDERATION (2).

BONDS—See EQUITY PRACTICE; PUBLIC OFFICERS; STARE DECISIS.

BOUNDARIES.

Where a fence has been established and recognized by the adjoining proprietors as on the true line for more than 20 years, such boundary will not be disturbed, although it may not have been originally placed on the true line. *F. H. Wolf Brick Co.* v. *Lonyo*, 162.

See EQUITY JURISDICTION (4, 5).

BRIBERY.

1. The solicitation of a bribe by a member of the legislature is a complete common-law offense, though the person solicited refuses to co-operate. *People* v. *Hammond*, 422.

2. An indictment charging that respondent, while acting as a legislator, did, at a certain time and place, corruptly solicit a certain person to give him a sum of money, with intent to influence his vote upon a bill pending in the house of representatives, is not defective for being argumentative, and failing to state the means or words used in soliciting. *Id.*

See CRIMINAL LAW (6, 7).

BRIDGES.

1. The authority granted by the board of supervisors to the city of Saginaw in 1891, to construct a bridge across the Saginaw river on Genesee avenue, was sufficient to authorize its construction in 1902. *Kundinger* v. *City of Saginaw*, 396.

2. A taxpayer cannot prevent the construction of a bridge across a navigable river on the ground that it has not been authorized by the board of supervisors. *Id.*

See MUNICIPAL CORPORATIONS (22).

BROKERS—See DEBTOR AND CREDITOR; EMBEZZLEMENT (2–4).

BUILDING CONTRACTS—See MECHANICS' LIENS.

BURDEN OF PROOF—See ATTORNEY AND CLIENT (3).

BY-LAWS—See BANKS AND BANKING (2–4).

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CANALS—See WATERS AND WATERCOURSES.

CARRIERS—See SALE (4).

CATTLE KILLING—See CONTRIBUTORY NEGLIGENCE (2).

CERTIFICATES OF ERROR—See TAXATION (10, 11).

CERTIORARI.

1. Where a defendant appears and pleads to the jurisdiction of a justice of the peace, which issue is decided against him, and no appeal is taken or notice given of an intention to remove the cause to the circuit court by *certiorari* within five days, as provided by statute, the common-law writ of *certiorari* will not lie to review the decision. *Jacobs* v. *Wayne Circuit Judge*, 55.
2. The common-law writ of *certiorari* will lie to remove a case from justice's court only where the statutory remedy is impossible of application. *Id.*

See MANDAMUS (1).

CHARACTER—See EVIDENCE (1).

CHARITABLE USES—See TRUSTS AND TRUSTEES (6).

CHATTEL MORTGAGES.

1. In a suit by a second chattel mortgagee to enforce the assignment to it of the first mortgage, it is no defense that one of the mortgagors was an accommodation maker, where there is nothing to show that complainant had knowledge of it, and nothing in the mortgage to indicate such an understanding. *Williams Bros. Co.* v. *Hanmer*, 635.
2. The owner of a second chattel mortgage can compel the assignment to him of the first mortgage upon payment of the amount due upon it. *Id.*

See CORPORATIONS (2-4); TAXATION (18, 19).

CHECKS—See BANKS AND BANKING (6, 7).

CITIES AND VILLAGES—See MUNICIPAL CORPORATIONS.

CLERICAL ERRORS—See JUDGMENTS (3, 4); MECHANICS' LIENS (5).

COLLATERAL ATTACK—See JUDGMENTS (2).

COLLATERAL SECURITY.

Complainant assigned a mortgage to a bank as collateral security for a loan of less than the amount of the mortgage. The bank foreclosed the mortgage, which it afterwards discharged upon receipt of only the amount due it on the loan. *Held*, that the evidence showed that the mortgage was discharged at the request of complainant, and that a bill for an accounting for the difference between the amount of the loan and the mortgage could not be maintained against the bank. *Lowry* v. *Paw Paw Sav. Bank*, 228.

See CONSIDERATION (2); MORTGAGES (1).

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COMMERCIAL PAPER—See BILLS AND NOTES.

COMMON COUNTS—See PLEADING (1).

CONDITIONAL SALE—See LARCENY.

CONDUCT OF COUNSEL—See CRIMINAL LAW (2, 3); TRIAL (5).

CONFLICT OF LAWS.

1. The liability of a master to his servant for a negligent personal injury is governed by the law of the place of the injury. *Rick* v. *Saginaw Bay Towing Co.*, 237.

2. A Canadian statute making an employer liable for an injury to a workman caused by the negligence of a servant who has any superintendence intrusted to him, or to whose directions the workman was bound to conform, is not contrary to the public policy of this State, and will be applied in a case where the injury occurred in Canadian territory. *Id.*

CONSIDERATION.

1. Where a note, indorsed by persons against whom it may be enforced, and a chattel mortgage, are given as the consideration of other notes, the consideration does not wholly fail, though the maker of the former note becomes a bankrupt. *Central Sav. Bank* v. *O'Connor*, 578.

2. An extension of time for the payment of a pre-existing debt is a sufficient consideration to constitute the creditor a *bona fide* holder in taking stock as security for the debt. *Just* v. *State Sav. Bank of Ionia*, 601.

See ACCORD AND SATISFACTION; DEEDS (1); MARRIED WOMEN.

CONSPIRACY—See FRAUD.

CONSTITUTIONAL LAW.

Act No. 303, Local Acts 1901, is not unconstitutional in abridging the functions of the highway commissioner of Grosse Pointe, a constitutional officer, as the amendment of 1899 (Const. art. 4, § 49) authorizes the legislature to modify, change, or abolish the powers and duties of the township highway commissioner. *Campau* v. *Highway Com'r of Grosse Pointe*, 365.

See CORPORATIONS (6, 7); CRIMINAL LAW (5); LOG-LIEN PROCEEDINGS (4); NEW TRIAL (3); TAXATION (3, 7, 9).

CONTAGIOUS DISEASES—See PUBLIC HEALTH.

CONTEMPT.

1. Acts done by strangers, without the privity or consent of a party, do not make him guilty of contempt. *Stock* v. *Township of Jefferson*, 96.

2. In this case, a decree enjoining defendant from diverting water from a lake, and requiring him to fill up a ditch, is examined, and it is *held* that it should not be so construed as to render him liable for contempt because strangers, without his knowledge, tore away dams he had built to fill up the ditch. *Id.*

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CONTRACTS.

1. The heirs of a decedent entered into an agreement by which part of them assigned to S. "all their right and interest in and to the share of the whole of the estate remaining as is hereinafter more fully specified." A subsequent provision recited that the heirs should be tenants in common, and that S. should receive four out of fifteen shares. *Held*, that S. was not entitled to the whole estate by the assignment, but the language quoted referred to the share allotted to him in the subsequent provision. *Lasley* v. *Preston*, 209.

2. A contract giving a railroad company the right to maintain and operate a side track "for and during such time as the business is carried on for the accommodation of which said side track is constructed" is not void for want of mutuality because it gives the railroad "the right to remove said track whenever, in its judgment, said business is not sufficient to justify it." *Michigan Cent. R. Co.* v. *Chicago, etc., R. Co.*, 325.

3. A harsh and inequitable provision in a side-track agreement, to the effect that the mill owner should assume all risk of damage to persons or property by reason of the use of the track, is no answer to an attempt to enforce other and valid provisions of the contract. *Id.*

4. Stipulations for forfeiture are not favored, and will be strictly construed. *Small* v. *Robarge*, 357.

5. The lessees of land agreed with a beet sugar company to raise and deliver to the company 40 acres of beets at an agreed price. The season becoming unfavorable, the mortgagee of the crop refused to furnish money to complete the raising of the beets unless the company would give the parties the same indemnity it had given R.; and, upon being assured of such indemnity, he made further expenditures. *Held*, that the company could not deny that a contract was made. *Constantine* v. *Kalamazoo Beet Sugar Co.*, 481.

See ACTIONS; CORPORATIONS (1, 11); INSURANCE; MARRIED WOMEN; MECHANICS' LIENS; MUNICIPAL CORPORATIONS (1–3, 21–23); PLEADING (1, 3, 4); SALE; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS; TAXATION (1–3); TELEPHONE COMPANIES; TIMBER; VENDOR AND PURCHASER; WATERS AND WATERCOURSES; WITNESSES (8, 9).

CONTRIBUTORY NEGLIGENCE.

1. The presence of a carpenter in a doorway, removing the door, is not notice to a fellow employé that a platform and stairway inside the door have been removed, so as to make him negligent, as a matter of law, in not heeding the warning. *Preuschoff* v. *B. Stroh Brewing Co.*, 107.

2. Plaintiff's cattle, while crossing a railroad track in the highway, were killed by a wild engine. If the bell had been rung and the whistle sounded as required by the statute, plaintiff's two sons, who were driving the cattle, would have been able to prevent the accident. Just before reaching the track, the

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CONTRIBUTORY NEGLIGENCE—Continued.

cattle stopped to drink at a pond. It did not appear that, if the drivers had at that time gone forward upon the track, they would have seen the engine, or that such precaution would have prevented the injury. *Held*, that whether the drivers were guilty of contributory negligence was a question of fact for the jury. *Brunick* v. *Ann Arbor R. Co.*, 219.

3. Where a seaman, whose death was occasioned by the tipping of a plank swung by ropes at the side of the vessel, could only have known how the ropes were fastened by a minute and careful examination, it was error to direct a verdict for the defendant on the ground that he was guilty of contributory negligence in descending to the staging to do the work he was ordered to do. *Rick* v. *Saginaw Bay Towing Co.*, 237.

4. While a telephone company was removing a pole from the street, it fell upon the foreman of a street-paving work, who was 35 feet from where the pole stood. *Held*, in an action against the telephone company for the injury, that the fact that the foreman knew that the telephone wires were being cut and removed was not sufficient notice that the pole would fall. *Kyes* v. *Valley Telephone Co.*, 281.

5. Where there was conflicting testimony as to whether plaintiff's intestate was warned as to the danger, the question of contributory negligence was properly left to the jury. *Id.*

6. One driving a horse accustomed to shy at objects in the highway, and paying no attention to the road, but admiring the scenery, is guilty of contributory negligence in driving along a narrow and high embankment into a washout in plain view. *Tracey* v. *Township of South Haven*, 492.

7. A person who, in passing from his car to the dining car on a vestibule train, fell from the platform through an open vestibule door, was not guilty of contributory negligence, in the absence of any showing that he knew or should have known the door was open. *Robinson* v. *U. S. Benevolent Soc.*, 695.

See ELEVATORS; NEGLIGENCE (1).

CORPORATIONS.

1. A vice-president of a corporation, having entire charge of one department of the company's business, and acting as manager and agent, has authority to bind the company in leasing a room for the necessary storage of the company's property. *Drew* v. *Billings-Drew Co.*, 65.

2. Authority for the execution of a chattel mortgage by a corporation is shown by a recital in its records that, at a meeting of all the stockholders (which included all the directors), the mortgage was read, and a motion made and carried approving the same. *Crossette* v. *Jordan*, 78.

3. That stockholders, on the day before the corporation gave them a mortgage, paid the balance due on their subscriptions to its capital stock by giving it credit on its indebtedness to them, does not, as a matter of law, prove that there was fraud in the execution of the mortgage. *Id.*

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CORPORATIONS—Continued.

4. Where the jury were instructed that, in determining the question of fraud in the execution of a mortgage by a corporation to its stockholders, they should take into consideration the relationship of the parties, defendant, who did not ask for a more detailed instruction, cannot complain that they should have been instructed that the relationship was such as to call for the utmost good faith on their part. *Id.*

5. An insurance corporation organized in another State can only be admitted to do business in this State upon such terms as this State may see fit to impose. *Pollock* v. *German Fire-Ins. Co.*, 225.

6. The imposition of terms upon an insurance company of another State not imposed upon insurance companies organized in this State does not violate the fourteenth amendment to the Constitution of the United States. *Id.*

7. 2 Comp. Laws, § 7246, does not violate the fourteenth amendment to the Constitution of the United States, in imposing conditions upon insurance companies of other States not imposed upon insurance companies of this State; the courts of this State having adopted the same rule in regard to domestic corporations. *Id.*

8. Section 5472, 2 Comp. Laws, is not repealed by section 44 of Act No. 113, Pub. Acts 1877. *M. C. Bullock Manfg. Co.* v. *Sunday Lake Iron Min. Co.*, 285.

9. The title to an act (Act No. 113, Pub. Acts 1877), limiting it to the revision of the laws providing for the incorporation of certain companies, does not authorize the repeal of a section of an act (2 Comp. Laws, § 5472) authorizing corporations of other States to engage in business in this State. *Id.*

10. A clause in an act relating exclusively to domestic corporations, purporting to repeal, "so far as they relate to" such corporations, certain specified acts, among them one referring solely to foreign corporations, cannot be said to effect a repeal of the last mentioned act. *Id.*

11. Where lessees of land have agreed to raise and deliver to a beet sugar factory a crop of sugar beets, and, after partially raising the crop, it becomes doubtful whether the venture will prove a success, the secretary and manager of the factory has authority to make a contract with the lessor, who is also a mortgagee of the crop, that, if he will furnish the money to complete the raising of the beets, the company will guarantee the parties against loss. *Constantine* v. *Kalamazoo Beet Sugar Co.*, 480.

12. One who agrees to take a certain amount of the increased capital stock of a corporation on condition that a third person take a certain amount, after it has been issued to and accepted by him, is bound to pay for the same, especially where the amended articles are filed before suit is begun for the purchase price. *Reid* v. *Detroit Ideal Paint Co.*, 528.

13. There should be valid and binding subscriptions to stock before articles of incorporation are filed. *Id.*

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CORPORATIONS—Continued.

14. Where a person subscribes to the increased capital stock of a corporation, his liability to pay does not depend upon his ratification of the agreement after the amended articles are filed. *Id.*

15. On the trial of an issue whether a party subscribed to the increased capital stock of a corporation, testimony as to the subsequent embarrassed financial condition of the corporation is immaterial. *Id.*

16. Testimony by the party, that he would not have kept the stock if he had understood that it was issued to him as testified by a certain witness, is incompetent. *Id.*

17. The liability of one who has subscribed to the increased capital stock of a corporation cannot depend on the value he placed on the stock, or his secret intentions in taking it. *Id.*

18. The fact that all of the stock of a railway company is owned by a partnership association does not prevent a member of the partnership from objecting to the surrender of the railway company's note for additional stock in the railway company in settlement of the partnership affairs, on the theory that the debt of the railway is really the debt of the partnership. *Emery* v. *Kalamazoo & Hastings Construction Co.*, 560.

See MANDAMUS (4); MUNICIPAL CORPORATIONS; NOTICE (1); PARTNERSHIP ASSOCIATIONS; PRINCIPAL AND AGENT; TRIAL (2); WITNESSES (1).

COSTS.

Where, in a foreclosure suit, a tenant of the mortgagors appears and disclaims, he cannot recover costs against his codefendants, the mortgagors, who have not appeared. *Halpin* v. *Wayne Circuit Judge*, 54.

See DRAINS (2, 3); INTOXICATING LIQUORS.

COUNSEL, CONDUCT OF—See CRIMINAL LAW (2, 3); TRIAL (5).

COUNTIES—See PUBLIC HEALTH.

COVENANTS—See STATUTE OF LIMITATIONS.

CREDIBILITY OF WITNESSES—See WITNESSES (2–4, 6, 10).

CREDITORS' BILLS—See HUSBAND AND WIFE (1); RES JUDICATA.

CRIMINAL CONVERSATION—See BILLS OF PARTICULARS (1).

CRIMINAL LAW.

1. The failure of the foreman of the grand jury to indorse the name of a witness upon an indictment is not sufficient reason for excluding his testimony, where respondent has had fair notice that the witness will be sworn. *People* v. *Hammond*, 422.

2. A statement by the prosecuting attorney in his argument to the jury, that the people's witnesses stand undisputed, does not

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CRIMINAL LAW—Continued.

infringe the rule forbidding the prosecutor to comment on the fact that the respondent was not made a witness. *Id.*

3. A statement by the prosecutor that "defendant's counsel, when he said the people's witnesses and God were the only ones who knew the contents of the telegrams, forgot his client, whom it is alleged the telegrams were sent to, and who it is claimed sent one of them," was not error, where the court charged the jury that the fact that respondent did not take the stand in his own behalf should not weigh against him. *Id.*

4. An information need not be wholly based upon the complaint or warrant, but it may charge the offense disclosed at the preliminary examination. *People* v. *Karste*, 455.

5. The provision of the Constitution, securing to the defendant in a criminal prosecution the right to be confronted with the witnesses against him, does not permit the admission of a certificate of a county clerk that, after diligent search, he is unable to find any record of a marriage between certain persons, for the purpose of showing that the marriage did not take place. *People* v. *Goodrode*, 542.

6. An information charging respondent with bribing a village clerk to issue false sparrow certificates under 2 Comp. Laws, §§ 5586–5589, was not defective in not containing the word "English" before the word "sparrow," where the information showed on its face that the sparrow certificates contemplated were such as could only be issued in compliance with the statute, and there was no chance for misapprehension. *People* v. *Gorsline*, 549.

7. In a prosecution for bribing a village clerk to issue false sparrow certificates, testimony of prior similar transactions, coupled with evidence tending to show a conspiracy with another to continue them, was admissible for the purpose of characterizing and making clear the purpose of respondent in the payment of the money upon which the prosecution was based. *Id.*

See ASSAULT; BRIBERY; EMBEZZLEMENT (2–4); LARCENY; POLICE; PURE-FOOD LAWS; SEDUCTION; TRIAL (9, 10, 12–14).

DAMAGES.

1. It is error to instruct the jury that exemplary damages include damages given for the purpose of punishment. *McChesney* v. *Wilson*, 252.

2. An administrator, in an action to recover for personal injuries resulting in the death of his intestate, is entitled to recover, under the "Survival Act" (3 Comp. Laws, § 10117), for what the deceased might have earned during the time he probably would have lived had he not been injured. *Kyes* v. *Valley Telephone Co.*, 281.

See APPEAL AND ERROR (3); ATTORNEY AND CLIENT (2, 3); EMBEZZLEMENT (1); HIGHWAYS (2, 3); LIBEL AND SLANDER (4); SALE (3); TROVER; WATERS AND WATERCOURSES (4).

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DEBTOR AND CREDITOR.

Where a broker received a check in a letter, with instructions to use it in the purchase of certain stock, and replied that it had been placed to the credit of the principal, who subsequently canceled the order and directed the purchase of other stock, the question as to whether the relation of debtor and creditor existed between them was one of fact for the jury. *People* v. *Karste*, 455.

See ACCORD AND SATISFACTION; BANKRUPTCY; COLLATERAL SECURITY; CONSIDERATION (2); TRUSTS AND TRUSTEES (1–4).

DEDICATION OF LANDS—See MUNICIPAL CORPORATIONS (17); PLATS.

DEEDS.

1. Complainant conveyed his homestead to defendant in consideration that he should be furnished "a comfortable house to live in, good board and lodging, clothing, and all necessaries of life." After living with defendant for a year and a half, he left without cause, and defendant published a notice forbidding any one to trust or harbor him on his account. On a bill by complainant to set aside the deed, it was *held* that a decree should be entered compelling defendant to pay for complainant's maintenance since the publication of the notice and until complainant should choose to return, declaring the conveyance a trust to secure the performance of defendant's obligations, and, upon failure to perform such obligations, the property should revert to complainant. *Cornell* v. *Whitney*, 300.

2. The presumption of the delivery of a deed, arising from its production by the grantee, was, in this case, overcome by evidence showing that it was not delivered when signed, nor for five years thereafter, that a companion deed could not be produced, and that the grantee, after the death of the grantor, made contradictory statements concerning the delivery, and inconsistent with his claim of title. *Barron* v. *Mercure*, 439.

3. A certificate of acknowledgment of a deed by a notary who is interested in the land does not render the deed void, as title would pass without an acknowledgment. *Schwartz* v. *Woodruff*, 513.

See STATUTE OF LIMITATIONS; TRUSTS AND TRUSTEES (1–5); WILLS (1, 2).

DEFICIENCY—See BANKRUPTCY (4); MORTGAGES (5).

DELIVERY—See BILLS AND NOTES (2, 3); DEEDS (2); SALE (4).

DISCHARGE—See BANKRUPTCY.

DISSOLUTION—See PARTNERSHIP ASSOCIATIONS.

DIVORCE.

1. Where a wife obtains a decree for separate maintenance from her husband, the monthly allowance should cease with his

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DIVORCE—Continued.

death, and then she should be left to her interests in his estate according to law. *Wagner* v. *Wagner*, 343.

2. On an appeal by a wife from a decree for separate maintenance, she cannot complain because the amount decreed to be paid by the defendant to her former solicitor is excessive. *Id.*

See DOWER.

DOCKET ENTRIES—See JUSTICES OF THE PEACE.

DOGS.

1. The fact that a dog is a trespasser does not in itself justify a person in killing him. *McChesney* v. *Wilson*, 252.

2. Where a person killed a dog which had killed his chickens and continually committed nuisances about his premises, the question of his liability should have been submitted to the jury, to determine whether the killing was reasonably necessary under all the circumstances. *Id.*

See PLEADING (2); TRIAL (7).

DOUBLE TAXATION—See TAXATION (3).

DOWER.

1. A wife who has obtained a divorce from her husband on the ground of extreme cruelty is entitled to dower in his lands in the same manner as if he were dead. *Moross* v. *Moross*, 203.

2. A divorced wife's right to dower in her husband's lands is not based upon the decree, but upon the statute (3 Comp. Laws, § 8639), and therefore her right of action to recover possession is not barred in 10 years, the time limited for bringing actions upon judgments and decrees, but only by the 15 years allowed by the statute (3 Comp. Laws, § 9714, subd. 3) for the recovery of the possession of lands. *Id.*

DRAINS.

1. Evidence, in a suit by a drain commissioner to recover the costs of a drain proceeding that had been dismissed, considered, and *held* insufficient to justify the jury in finding that interlineations in the application were made after it had been received by the commissioner. *Brown* v. *Kennedy*, 464.

2. Where changes were made in the description of a drain after the application had been signed by the petitioners and before it was received by the commissioner, the fact that the commissioner acted upon it in good faith did not give him a right to recover his costs against the petitioners, under 2 Comp. Laws, § 4319. *Id.*

3. The bill of costs in a drain proceeding that has been dismissed is admissible in a suit by the commissioner to recover the costs. *Id.* 465.

See ESTOPPEL (1); EVIDENCE (7-9).

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DRIVING—See NEGLIGENCE (1, 2).

DURESS.

A person who pleads guilty to a charge of obtaining money by means of threats, and returns the money he had received as a condition of his release, cannot recover the money on the ground that it was paid under duress of imprisonment. *Coveney* v. *Phiscator*, 258.

EJECTMENT.

Notwithstanding, by statute (3 Comp. Laws, § 10950), the question of title, set up by one not in possession, may be tried in an action of ejectment, it is still a possessory action, and the person in possession is a necessary party. *Farrand* v. *Kavanaugh*, 486.

See AMENDMENTS; DOWER (2); JURISDICTION; MUNICIPAL CORPORATIONS (17); PRACTICE IN CIRCUIT COURT (2); RAILROADS (4).

ELECTIONS.

In a proceeding to try the title to the office of judge of probate, the finding of the jury that the ballots counted by the county canvassers were the same ballots that were voted is conclusive. *Attorney General, ex rel. Garthe*, v. *Campbell*, 82.

ELECTRICITY—See MASTER AND SERVANT (5).

ELEVATORS.

1. Plaintiff entered an elevator, and asked to be let off at the office of a tenant which was on the twelfth floor, but plaintiff did not know on which floor the office was located. All the passengers had left when the ninth floor was reached, where the elevator was stopped, and the doors opened, to let on a passenger, whom plaintiff did not see. Plaintiff, thinking the elevator had stopped to let him off, started to alight, and was caught and injured by the elevator starting at the same time. The conductor began closing the doors as the elevator started. *Held*, that whether the conductor was guilty of negligence, and plaintiff of contributory negligence, were questions for the jury. *Roulo* v. *Minot*, 317.

2. Under ordinary circumstances, an open door and a stationary elevator constitute an invitation to all persons to enter or leave at will. *Id.*

EMBEZZLEMENT.

1. In an action against a clerk to recover for money embezzled, evidence, in addition to proof of specific items taken, that, during the year preceding the last act of defalcation, the profits of the business were largely reduced, although the sales were larger at the same advance over cost, and the expense of the business less, together with testimony that defendant had expended and accumulated sums largely in

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EMBEZZLEMENT—Continued.

excess of her income, made it a question for the jury to determine whether a larger sum was embezzled than the specific items proven. *Adams* v. *Elseffer*, 100.

2. A broker who, having received a check and written instructions to buy stock, did not buy, but deposited the check in a bank to his account, and spent the money, was rightly convicted under 3 Comp. Laws, § 11572. *People* v. *Karste*, 455.

3. The word "agents," used in said statute, includes "brokers." *Id.*

4. On October 18th, respondent received by mail a check for $350, with instructions to buy certain stock. He deposited the check in a bank to his credit, and on November 14th received instructions to cancel the first order and buy other stock. At times between October 18th and November 14th his bank account amounted to less than $350. *Held*, that as the bank account on November 16th was $932.16, and on that date the respondent wrote that he had entered the order to buy the other stock mentioned, the jury were justified in finding that he had the funds in his hands on November 14th. *Id.*

EQUITY JURISDICTION.

1. Where a bill alleges that complainant has paid money to a corporation under a contract not wholly illegal, supposing it was legal and acting in good faith, while defendants knew that the business to be transacted under the contract was a cheat and a fraud, the parties are not *in pari delicto*, and equity has jurisdiction to compel an accounting. *Edwards* v. *Michigan Tontine Investment Co.*, 1.

2. A demurrer to a bill on the ground that complainant has an adequate remedy at law should be overruled, where the bill alleges that defendants, the directors and stockholders of a corporation, conspiring together, obtained complainant's money by means of fraud, that the corporation did a large business, is insolvent, that defendants have converted the money taken in by the corporation, and prays for an accounting and an examination of the books. *Id.*

3. Where, through the fraudulent conduct of city officers, a paving contract has been departed from in the construction of the work, to the damage of the municipality, equity has jurisdiction to restrain the work upon the complaint of taxpayers. *Central Bitulithic Paving Co.* v. *Manistee Circuit Judge*, 126.

4. Where a party is in possession of a tract of land, claiming title, to a line which has been recognized and acquiesced in for the statutory period, equity has jurisdiction to enjoin the owner of the adjoining premises from moving the boundary fence upon the premises so occupied. *F. H. Wolf Brick Co.* v. *Lonyo*, 162.

5. Where a bill to quiet title alleged that defendant moved a portion of the line fence upon the premises, which complainant had occupied under claim of title for upwards of 20 years, and that defendant disputed complainant's title, and

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EQUITY JURISDICTION—Continued.

defendant, without demurring, answered and took proofs, he could not insist upon the final hearing that he was entitled to have the issue tried in an action of ejectment. *Id.*

6. The court of chancery has power to open its decrees to correct errors. *Cole* v. *Auditor General*, 262.

7. A decree is not void for want of jurisdiction because the judge had previously filed an opinion stating that the testimony was conflicting, and not clear, and that the decree would remain open for further hearing upon matters to happen after the filing of the opinion, though there was no subsequent hearing. *Krebs* v. *Senig*, 346.

8. This case is substantially like *Edwards* v. *Michigan Tontine Investment Co.*, *ante*, 1. The fact that complainant, after ascertaining the fraudulent conduct of defendants, refused to continue payments upon his contract, does not justify a different result. *Bale* v. *Michigan Tontine Investment Co.*, 479.

9. In a suit in chancery by the owner of land to protect his land from a claim asserted against it, the value of the land, and not the amount of the claim, determines the jurisdiction of the court. *Matteson* v. *Matteson*, 516.

10. Where a creditor files a bill in aid of execution, the amount of the execution, and not the value of the land, determines the jurisdiction of the court. *Id.*

See RECEIVERS (2).

EQUITY PRACTICE.

An appeal bond in chancery does not secure the payment of a decree which is otherwise secured. *Reid* v. *Wayne Circuit Judge*, 406.

See APPEAL AND ERROR (4, 6, 7); MORTGAGES (1, 5); PARTITION; SPECIFIC PERFORMANCE; STARE DECISIS; TAXATION (4, 6, 8, 9).

ERROR—See APPEAL AND ERROR.

ESTATES IN LAND—See WILLS (6–8).

ESTATES OF DECEDENTS.

The fact that testatrix left a legacy to her mother is inadmissible to show that the deceased had not purchased notes given by the mother. *Crampton* v. *Newton's Estate*, 149.

See CONTRACTS (1); JUDICIAL RECORDS; WILLS; WITNESSES (1, 8, 9).

ESTOPPEL.

1. In an action by a drain commissioner to recover his costs against the petitioners, where it is claimed that alterations were made in the petition after it was signed, evidence is admissible to show that the defendants concealed or failed to

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ESTOPPEL—Continued.

assert the alterations, as such evidence tends to show an estoppel. *Brown* v. *Kennedy*, 465.

2. A member of a partnership association, by receiving payment from a corporation of a partnership note which the corporation has assumed, is not estopped from objecting to the exchange of the partnership property for stock of the corporation, made for the purpose of winding up its affairs. *Emery* v. *Kalamazoo & Hastings Construction Co.*, 560.

3. The fact that plaintiff did not proceed at once to assert his rights to his property by replevin after learning that it was in the possession of one who had purchased it from his bailee does not estop him from recovering it from a subsequent purchaser, where he had no knowledge of an intent of the vendee to further transfer it. *Nichols* v. *Monjeau*, 582.

See CONTRACTS (5); TITLE TO LANDS; VENDOR AND PURCHASER (6).

EVIDENCE.

1. In an action to recover money misappropriated by a clerk, testimony as to his good character is inadmissible. *Adams* v. *Elseffer*, 100.

2. Where defendant gave plaintiff notice to produce all letters written by her to plaintiff between certain dates, evidence that she had written letters not produced, and destroyed some of those received by her at plaintiff's request, sufficiently accounts for the loss of the letters to justify parol evidence of their contents. *June* v. *Labadie*, 135.

3. The testimony of a party to a written contract of sale of certain heading, that the place of delivery was Liverpool, there being no doubtful phrases in the contract, is inadmissible. *Althouse* v. *McMillan*, 145.

4. An agreement for the settlement of an estate, filed in the probate court, will be presumed to be genuine after the lapse of 20 years. *Lasley* v. *Preston*, 208.

5. Parol testimony is admissible to prove telegrams where it appears that the telegraph company has destroyed the originals. *People* v. *Hammond*, 422.

6. Where the original telegram has been destroyed by the company, a telegram received as and purporting to be an answer is admissible in evidence. *Id.*

7. It is within the discretion of the trial judge to require a drain commissioner to explain alterations in a drain application before admitting it in evidence, in an action by him to recover his costs against the petitioners. *Brown* v. *Kennedy*, 465.

8. Any possible presumption that the alterations in a drain petition were made before the paper was signed was in this case eliminated by the testimony of the applicants that they signed before the changes were made, and the testimony of the surveyor that he made the alterations before any one signed the paper. *Id.*

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EVIDENCE—Continued.

9. The opinion of a surveyor that a drain application was a regular and fair appearing paper is inadmissible. *Id.*

See ADMISSIONS; APPEAL AND ERROR (1, 2, 9); ASSAULT; BILLS AND NOTES (2-4); CORPORATIONS (15, 16); CRIMINAL LAW (1, 5, 7); DRAINS (3); ESTATES OF DECEDENTS; ESTOPPEL (1); FIXTURES (3, 4); HUSBAND AND WIFE (3); JUDICIAL RECORDS; LIFE INSURANCE (1); MARRIAGE (2); MUNICIPAL CORPORATIONS (3); NEW TRIAL; TAXATION (6); TRIAL (4, 6-8, 11, 16); WITNESSES.

EXECUTION.

The fee in land occupied as a homestead cannot be sold on an execution against the owner. *Burkhardt* v. *James Walker & Son*, 93.

See EQUITY JURISDICTION (10); LIENS (2).

EXECUTORS AND ADMINISTRATORS—See DAMAGES (2); RECEIVERS (1); WILLS (6, 8, 9):

EXEMPLARY DAMAGES—See DAMAGES (1).

EXEMPTIONS—See EXECUTION.

EXPERT TESTIMONY—See WITNESSES (10).

EXTENSION OF TIME—See CONSIDERATION (2).

FAILURE OF CONSIDERATION—See CONSIDERATION (1).

FELLOW-SERVANTS—See CONFLICT OF LAWS (2); MASTER AND SERVANT (1, 3); RAILROADS (2).

FENCES—See BOUNDARIES; EQUITY JURISDICTION (4, 5).

FIRE INSURANCE.

The act under which a mutual fire-insurance company was incorporated provided that suit might be brought if payment of a claim was withheld more than 60 days after it became due. A policy provided that a claim for loss should not become payable until 60 days after notice. *Held*, that suit could be brought at the expiration of 60 days after notice of loss. *Putze* v. *Saginaw Valley Mut. Fire-Ins. Co.*, 671.

See PLEADING (5, 6).

FIXTURES.

1. A mill and milling machinery placed upon land by one occupying under a contract of purchase become part of the real estate, and are covered by a subsequent mortgage of the land. *Morley* v. *Quimby*, 140.

2. A cupola and crane, bricked up and built into a building by the owner, were real estate, and passed to the purchaser at a foreclosure sale of the real estate, as against one who obtained

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FIXTURES—Continued.

a bill of sale of them pending the foreclosure, where it appeared that their value would have been impaired by their removal, and without them the building would not have been in condition for immediate use. *Lord* v. *Detroit Sav. Bank*, 510.

3. The transfer of the crane and cupola pending the foreclosure, and long after their annexation to the realty, is inadmissible to show the intent with which they were annexed. *Id.*

4. A verbal agreement between the agent of the purchaser at the foreclosure sale and the owner, just before the latter yielded possession, that such cupola and crane might be removed by the owner, does not prove that the mortgagees considered the property personalty at the time it was annexed. *Id.*

See STATUTE OF FRAUDS (3).

FORECLOSURE—See BANKRUPTCY (4); COSTS; FIXTURES (2–4); MORTGAGES; PARTITION (2, 8); VENDOR AND PURCHASER (6).

FOREIGN CORPORATIONS—See CORPORATIONS (5–10).

FOREIGN JUDGMENT—See JUDGMENTS (1, 2).

FORFEITURE—See CONTRACTS (4); SUMMARY PROCEEDINGS; TIMBER.

FRANCHISES—See TELEPHONE COMPANIES.

FRAUD.

A conspiracy to defraud creditors will not be inferred from slight evidence. *Lyon* v. *Clark*, 521.

See CORPORATIONS (3, 4); EQUITY JURISDICTION (1–3, 8); STATUTE OF FRAUDS; TAXATION (4–6, 12, 13); TRIAL (15).

FRAUDULENT CONVEYANCES—See HUSBAND AND WIFE (1); TRUSTS AND TRUSTEES (1–3).

GARNISHMENT.

Mandamus will lie to compel a justice to issue a summons to show cause in garnishment proceedings, if such summons is applied for within the time allowed by 1 Comp. Laws, § 997, although the plaintiff did not appear at the time of the disclosure, and the justice entered a judgment against him. *Hyde* v. *Chadwick*, 270.

GENERAL ISSUE—See PLEADING (3–5).

GIFTS.

1. When a person 85 years old, desiring to give a domestic in his household $500, on the day of his death, in order to carry out his wish, indorsed in lead pencil four certificates of bank stock, of the aggregate value of $4,500, it was *held* that the transfer was a mistake, and should be set aside, except that the servant should be allowed to retain $500 in par value of

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GIFTS—Continued.

the stock, conceded to her by the executor and heirs of the deceased. *Crippen* v. *Adams*, 31.

2. A man had an account with a bank, which was so arranged that his wife could draw the money as well as himself. He told the bank teller it was as much her money as his. At the time of executing his will, he said the money in the bank belonged to his wife; that she had the same control over it that he had. *Held*, that the testimony did not indicate that he had ever deprived himself of authority over the fund, and therefore did not show a gift *inter vivos*. *Burns* v. *Burns*, 441.

GRADE, CHANGE OF—See MUNICIPAL CORPORATIONS (19, 26).

GUARANTY.

Defendant leased certain premises, and agreed to save the tenant harmless from loss or damage on account of an adverse claim of ownership made by plaintiff. After plaintiff's right had been established, the tenant assigned to her his claim for rent paid under the lease. She then brought suit against defendant for the money paid by the tenant. *Held*, that she could not recover under the guaranty, as no suit for damages had been brought against the tenant. *Sherman* v. *Spalding*, 249.

See CONTRACTS (5); CORPORATIONS (11); MORTGAGES (1).

HIGHWAYS.

1. Evidence that for the whole spring, and until May 1st, the time of plaintiff's injury, a washout existed in the highway, and that for a period of two years previous, when it had been raining, washouts occurred at or near the same place, warranted the inference that the township had knowledge of the condition of the highway, and justified the submission of the question of its negligence to the jury. *Tracey* v. *Township of South Haven*, 492.

2. One who is not entitled to notice of proceedings to vacate a street cannot recover damages of a person for causing it to be closed. *Beutel* v. *West Bay City Sugar Co.*, 587.

3. One who has no property or private right of way abutting upon a street which has been vacated cannot complain. *Id.*

See CONSTITUTIONAL LAW; CONTRIBUTORY NEGLIGENCE (6); NEGLIGENCE (1, 2); PLATS.

HOMESTEAD.

1. One who resides on property owned by himself cannot claim a homestead in another parcel upon which he is at the time erecting a dwelling. *Delray Lumber Co.* v. *Keohane*, 17.

2. In a suit to enforce a mechanic's lien upon a dwelling, defendant claimed the house was her homestead, and testified that, while it was being built, she lived on a certain street in a house which she did not own, and that she had no other prop-

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HOMESTEAD—Continued.

erty in the city than that involved in the suit. Complainants put in evidence a deed executed by her after the lien had attached, conveying a lot on the street upon which she lived. *Held*, that the circuit judge was justified in discrediting her testimony, and his finding that the property involved in the suit was not her homestead would not be disturbed on appeal. *Id.*

3. A wife may maintain a bill in equity to set aside a levy on and sale of her husband's homestead on execution. *Burkhardt* v. *James Walker & Son*, 93.

4. A temporary removal from a homestead, with the intention of a speedy return, does not constitute an abandonment. *Id.*

5. A conveyance of a homestead by a husband and wife to a third person, who at once conveys to the wife, being for the purpose of placing the title in the wife, does not constitute an abandonment. *Id.*

See EXECUTION; MECHANICS' LIENS (6, 7).

HUSBAND AND WIFE.

1. Where a man becomes insolvent by improving his wife's property with her knowledge and consent, a subcontractor who has furnished the husband with material for the improvements can maintain a bill in aid of an execution levied on the land, as well as a judgment creditor's bill. *Brand* v. *Connery*, 88.

2. The authority given a wife to use her husband's money is terminated by his death. *Burns* v. *Burns*, 441.

3. A statement by a husband that he is authorized to pledge his wife's stock to secure his debt does not tend to prove his authority. *Just* v. *State Sav. Bank of Ionia*, 600.

4. While a married woman cannot incur a personal obligation by becoming a surety for her husband, she may pledge her bank stock to secure his debt. *Id.*

See BENEFIT SOCIETIES (1, 2); DIVORCE; DOWER; GIFTS (2); HOMESTEAD (3, 5); MARRIAGE; MARRIED WOMEN; MECHANICS' LIENS (6, 7); WITNESSES (8, 9).

IMPEACHMENT—See WITNESSES (7).

INFANTS—See MASTER AND SERVANT (2).

INJUNCTION.

Injunction bills to restrain the completion of public improvements are not favored where there is no proof of fraud and the contract price is not exorbitant. *Kundinger* v. *City of Saginaw*, 395.

See CONTEMPT; EQUITY JURISDICTION (3, 4); MANDAMUS (2).

INSTRUCTIONS TO JURY—See CORPORATIONS (4); CRIMINAL LAW (3); LIBEL AND SLANDER (3, 4); TRIAL (1–3, 6, 8–10, 12–15); WITNESSES (3, 10).

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INSURANCE.

1. The local agent of an accident insurance company, to whom a policy is sent to be delivered to the applicant, is not the agent of the insured in receiving the policy, so as to effect a valid contract of insurance inconsistent with the terms of the application. *Robinson* v. *U. S. Benevolent Soc.*, 695.

2. Where an application for insurance provided that the contract should be complete when it was received at the company's office and accepted by its secretary, the application and its acceptance formed the contract until the policy was issued and received in its stead. *Id.*

3. A person whose application for insurance is received and accepted by the company cannot be bound by a policy issued and sent to the local agent for delivery, and containing provisions inconsistent with the application, until he has had an opportunity to ratify or waive the inconsistent provisions. *Id.*

See FIRE INSURANCE; LIFE INSURANCE.

INSURANCE COMPANIES—See CORPORATIONS (5-7); TAXATION (15-17).

INTENT—See CRIMINAL LAW (7); FIXTURES (3, 4); LARCENY; WILLS (3).

INTEREST.

Interest is recoverable upon an assessment by the receiver of an insolvent bank against a stockholder, when such assessment is past due and not paid on demand. *May* v. *Ullrich*, 6.

INTOXICATING LIQUORS.

Section 5399, 2 Comp. Laws, gives a plaintiff the right to recover costs in a civil action begun in the circuit court for the illegal sale of intoxicating liquors, although the damages awarded are less than $100. *Purvis* v. *Segar*, 167.

INVENTIONS—See SPECIFIC PERFORMANCE.

INVOICES—See SALE (7, 8).

JOINT CONTRACTS—See ACTIONS; PLEADING (3).

JOINT TORT FEASORS—See TORTS.

JUDGMENTS.

1. A judgment of a Canadian court will be presumed to have been regular, and within the jurisdiction of the court. *Coveney* v. *Phiscator*, 258.

2. A plaintiff who has, in a Canadian court, pleaded guilty to a charge of obtaining money by means of threats, and, in voluntarily returning the money, has anticipated the order of restitution authorized by the Canadian statute, cannot, in an action to recover the money as paid under duress, in the absence of fraud, show that he was not properly adjudged guilty. *Id.*

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JUDGMENTS—Continued.

3. A transcript judgment is not void because the attorney making the affidavit stated that the judgment was rendered in favor of "deponent," instead of the "plaintiff," where the affidavit was properly entitled in the cause, and showed who the plaintiff was in whose favor the judgment must have been rendered. *Frolich* v. *Mitchell*, 432.

4. A statement in such affidavit that the amount due was due to the deponent is not a jurisdictional defect, as 1 Comp. Laws, § 846, only requires the amount due on the judgment to be stated. *Id.*

See JUSTICES OF THE PEACE; PRACTICE IN CIRCUIT COURT (1).

JUDICIAL RECORDS.

1. After the lapse of 20 years, an order of the probate court will be presumed to have been based on due notice. *Lasley* v. *Preston*, 208.

2. An order of the probate court dividing an estate in accordance with the terms of an agreement necessarily involves a determination that all the parties in interest were before the court. *Id.* 209.

3. A probate record of the proceedings in the settlement of an estate is not rendered inadmissible by the fact that there were entered therein purported copies of powers of attorney and releases which had been used as evidence by the probate judge in settling the estate, *Id.*

JURISDICTION.

A defendant in an action of ejectment, who appears and pleads to the merits, waives any objection to the jurisdiction of the court based on the ground that he was made a party by an amendment to the declaration. *Farrand* v. *Kavanaugh*, 436.

See EQUITY JURISDICTION; JUSTICES OF THE PEACE.

JURY, QUESTIONS FOR—See CONTRIBUTORY NEGLIGENCE (1–5); DEBTOR AND CREDITOR; DOGS (2); ELEVATORS (1); EMBEZZLEMENT (1, 4); HIGHWAYS (1); MASTER AND SERVANT (4); NEGLIGENCE (1, 3); RAILROADS (1); TRIAL (7, 8, 11, 16); WITNESSES (2, 4, 6).

JUSTICES OF THE PEACE.

1. Where the entries in a justice's docket show that a summons was issued, but not served on one of the defendants, and an *alias* was issued, but no entry of the appearance of the plaintiff on the return day, and no entry of the appearance of the defendants, a judgment rendered against them on the return day of the *alias* summons is void. *Purdy* v. *Law*, 622.

2. Such judgment cannot be sustained by considering the *alias* summons as the commencement of another action, where the docket fails to state when it was issued. *Id.*

See CERTIORARI; GARNISHMENT; JUDGMENTS (3, 4).

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JUSTIFICATION—See LIBEL AND SLANDER (1).

LABOR LIENS—See LOG-LIEN PROCEEDINGS.

LAND CONTRACTS—See FIXTURES (1); RAILROADS (4); STATUTE OF FRAUDS (2, 4-6); SUMMARY PROCEEDINGS; TAXATION (1-3); TIMBER; VENDOR AND PURCHASER.

LANDLORD AND TENANT.

1. A lessee of a building formed, with others, a corporation to carry on his business. The lessor declined to accept the corporation as his tenant for the unexpired term, but agreed with the corporation, through its agent, who was also the lessee, that the company might occupy the building at the same rental until he could find another tenant. *Held*, that the lease was surrendered by operation of law, and the corporation liable for the rent during the time it occupied the building. *Drew* v. *Billings-Drew Co.*, 65.

2. The owner of land cannot, under a count for money had and received, recover, from a person to whom the tenant has attorned, the rent paid by the tenant. *Sherman* v. *Spalding*, 249.

3. Plaintiff, shortly before the expiration of a written lease, wrote her tenant that she would renew the lease at an increased rental. Defendant's agent replied by telephone that it could not keep the premises at the increased price, but would take its fixtures out as soon as it could, to which plaintiff replied, "All right." Defendant vacated the portion of the premises occupied by it one week after the expiration of the lease, and a subtenant, six weeks after its expiration. *Held*, that, by holding over, defendant did not become plaintiff's tenant for another year. *Landsberg* v. *Tivoli Brewing Co.*, 651.

4. Under an arrangement that a tenant should hold over after the expiration of a written lease until it could remove its fixtures, where the rent was payable monthly, a full month's oral notice to quit by the tenant was sufficient. *Id.*

See CORPORATIONS (1); GUARANTY; STATUTE OF FRAUDS (1).

LARCENY.

Where the assignee of a contract authorizing the vendor to take possession of an organ in case it is not fully paid for takes possession of such organ under the belief that it has not been fully paid for, he is not guilty of the felonious intent necessary to constitute larceny, although the jury find that the purchase price had been paid. *People* v. *Walburn*, 24.

LEMON EXTRACT—See PURE-FOOD LAWS.

LIBEL AND SLANDER.

1. The defendant in an action for slander cannot complain because the judge limited certain evidence to mitigation of damages, where no exception was taken, and his counsel stated it was not offered in justification. *Hinchman* v. *Knight*, 532.

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LIBEL AND SLANDER—Continued.

2. Testimony in an action for slander, showing that plaintiff was in possession of certain goods, does not warrant an instruction that the words, "You broke in there and stole some goods, the other day, out of the house," are not actionable *per se*, where it does not appear that defendant and all the hearers knew the circumstances which rendered it impossible for plaintiff to steal them. *Id.*

3. Where the court, at the request of plaintiff, instructed the jury that, if they found that defendant used the language charged in the declaration, their verdict must be for plaintiff, and, at the request of defendant, instructed them that the words were not actionable unless intended to impute a crime, and that the action could not be maintained if they were accompanied by an explanation showing a crime was not committed, the jury must have understood that the instruction given at the request of plaintiff was qualified by those given at the request of defendant, and the question whether the language was actionable *per se* was left to the jury. *Id.*

4. Where, under the testimony in an action for slander, the words used were actionable *per se*, and the judgment was for $60, defendant was not injured by an instruction that, if the words were intended and understood to charge only a trespass, the jury should not award any damages that would be excessive. *Id.*

LIENS.

1. Where one of the holders of two concurrent liens purchases the property subject to the liens, his own lien is not merged in the title thus purchased. *M. C. Bullock Manfg. Co.* v. *Sunday Lake Iron Min. Co.*, 285.

2. Where a judgment creditor, who is also the holder of a lien on the debtor's property, causes a portion of the property, upon which there is a concurrent lien, to be sold on execution, and applies the proceeds upon the judgment, upon an accounting between the lienholders the proceeds of such sale should be deducted from his *pro rata* share under the lien. *Id.*

See BANKS AND BANKING (3–5); CORPORATIONS (8); LOG-LIEN PROCEEDINGS; MECHANICS' LIENS; TAXATION (18); VENDOR AND PURCHASER (7–9).

LIFE INSURANCE.

1. In an action on a life-insurance policy, the statement of the examining physician, a representative of the company, made at the time of the examination, that, in his opinion, the applicant was in good health, is admissible against the company to show that the decedent was in good health at the time the policy took effect. *Rhode* v. *Metropolitan Life-Ins. Co.*, 503.

2. Where the agent's certificate on an application for life insurance refers to a former application, and there is indorsed on such certificate, at the home office, the number of the prior application, it will be presumed that the company had knowledge of what the first disclosed. *Id.* 504.

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LIFE INSURANCE—Continued.

3. The fact that an applicant for life insurance had been attended by a physician for a mere temporary ailment will not render void a policy based upon an application stating that he had not been attended by a physician. *Id.*

See BENEFIT SOCIETIES.

LIGHTING, CONTRACTS FOR—See MUNICIPAL CORPORATIONS (1-3).

LIMITATION OF ACTIONS—See STATUTE OF LIMITATIONS.

LIMITED PARTNERSHIPS—See PARTNERSHIP ASSOCIATIONS.

LIQUOR TRAFFIC—See INTOXICATING LIQUORS.

LOG-LIEN PROCEEDINGS.

1. Under section 10761, 3 Comp. Laws, a sheriff may attach a car load of shingles for labor liens by serving a copy of the writ upon a station agent of a railroad company in whose possession the shingles are for the purpose of transit to a place within this State, although, at the time, they are in a different county from that in which the service is made. *Lake* v. *Pere Marquette R. Co.*, 190.

2. In such case the railroad company should deliver the attached property at once to the sheriff. *Id.* 191.

3. The statute, in providing that no sheriff shall seize and detain such property while in transit, indicates the legislative intent to permit it to be attached by service of the writ upon the company. *Id.*

4. The statute is not unconstitutional in not providing for the payment to the company of the expense of caring for the property from the time of service of the writ to the time the sheriff makes a demand for the property, since, in the case of a carrier, delivery should be made at once to the sheriff. *Id.*

LOSS OF PROFITS—See SALE (3).

LOST INSTRUMENTS—See EVIDENCE (2).

MANDAMUS.

1. *Mandamus* will lie to compel a circuit judge to dismiss a common-law writ of *certiorari* issued to a justice of the peace, where the party was not prevented from appealing or obtaining the statutory writ by circumstances beyond his control. *Jacobs* v. *Wayne Circuit Judge*, 55.

2. Where there is no exigency requiring immediate action, an order of a circuit judge refusing to dissolve an injunction will not be reviewed on *mandamus*, unless the question in dispute is one of law only, and such judge has acted without jurisdiction. *Central Bitulithic Paving Co.* v. *Manistee Circuit Judge*, 126.

3. *Mandamus* is a proper remedy to compel a telephone company to furnish a subscriber connections through its exchange. *Mahan* v. *Michigan Telephone Co.*, 242.

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MANDAMUS—Continued.

4. *Mandamus* will not be granted to compel the secretary of a private corporation to record the transfer of certificates of stock on the books of the company, as equity has jurisdiction to decree transfers, if an action at law does not afford an adequate remedy. *Clarke* v. *Hill*, 484.

See GARNISHMENT; TAXATION (17).

MARRIAGE.

1. Where a man and woman entered into a marriage contract in good faith, and continued to live and cohabit together as husband and wife, no formal ceremony was essential to the validity of the marriage. *Supreme Tent K. O. T. M.* v. *McAllister*, 69.

2. Where, on a trial for polygamy, respondent's testimony and that of his alleged first wife showed the performance of a marriage ceremony between them, followed by their living together as husband and wife, a valid marriage was shown, and hearsay testimony, introduced for the purpose of proving the marriage, was not prejudicial error. *People* v. *Goodrode*, 542.

See TRIAL (9, 10).

MARRIED WOMEN.

1. A contract by a married woman to pay for the board of an adult sister and her children does not relate to her separate estate, and is void. *June* v. *Labadie*, 135.

2. The undisputed testimony that a married woman received money to the full amount of notes given for it establishes the fact that the contract was one a married woman has power to make. *Crampton* v. *Newton's Estate*, 149.

3. Promissory notes given by a married woman in payment of the purchase price of notes, though the maker of the latter notes was insolvent, being given for the purchase of property, relate to her separate estate, and are valid. *Id.*

4. Where the uncontradicted testimony shows that a deceased person (a married woman) gave her notes in payment for notes purchased of claimant, the question of a valid consideration for her notes need not be submitted to the jury. *Id.*

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. Plaintiff, while working in defendant's shop as a puncher, was injured by the fall of a sheet of steel. He claimed that the fall was due to a nut fitting loosely to a bolt, which the foreman of the gang in which plaintiff was working obtained from the foreman of another gang. The latter had picked it up from the floor of the shop, and used it for holding up light plates. *Held*, that there was no sufficient evidence that defendant had furnished the defective tool to plaintiff for use, and the negligence, if any, was that of a fellow-servant. *Flaws* v. *West Bay City Shipbuilding Co.*, 169.

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MASTER AND SERVANT—Continued.

2. Where the testimony shows that a boy 16 or 17 years of age, who was injured in the cogwheels of a planer while waiting for the foreman to adjust the machine, had worked with the planer until he knew its manner of operation and the danger from the cogwheels, no recovery for the injury against his employer can be based upon a failure to warn him of the danger. *Berlin* v. *William B. Mershon & Co.*, 183.

3. The owner of a vessel cannot escape liability for an injury to a servant on the ground that the mate gave general directions, and the injury resulted from the misuse by a fellow-servant of the material provided, where there is evidence that it is the duty of the mate to attend to any work he orders done, and to see that it is done himself, and that he is hired for that purpose. *Rick* v. *Saginaw Bay Towing Co.*, 237.

4. Where a plank staging let down over the side of a vessel was held by a rope in such a manner as to allow it to tip, whereby a seaman fell into the water and was drowned, when the customary manner of fastening the rope would not permit it to tip, the question of negligence should be submitted to the jury. *Id.*

5. An electric railway company is not liable for the death of an employé, killed by a contact with the fuse block on a switchboard, where the evidence shows he was warned of the danger. *Cron* v. *Toledo & Monroe Ry.*, 497.

6. Where an experienced workman, familiar with the work, while engaged in constructing a hoisting apparatus for unloading coal from a vessel, fell from a platform which he had assisted in building, the danger of working in the place, if any, was as apparent to him as to any one, and the risk, if any, was assumed by him. *Cronin* v. *Russel Wheel & Foundry Co.*, 500.

7. Where an experienced workman, familiar with ropes and their uses, selects, from a pile of ropes at hand, one which breaks and causes him to fall, the master is not liable. *Id.*

8. An employé was injured by the fall of an air hoist suspended from a horizontal track, kept in place by flanges on the wheel and the force of gravitation. By reason of the neglect of a fellow-workman properly to regulate the air pressure after using the hoist, the piston descended, and, striking something, lifted the hoist from the track, so that it fell upon plaintiff. *Held*, that, as the danger from the defective attachment—*i. e.*, that any force raising the hoist would tend to detach it, and permit it to fall—was apparent to any careful observation, it was assumed by plaintiff. *Bauer* v. *American Car & Foundry Co.*, 537.

9. By the terms of his employment, a servant agrees that dangers obviously incident to the discharge of his duty shall be at his risk, and it is unimportant whether he is informed or knows of the particular danger to be apprehended. *Id.*

10. The fact that defendant's assistant foreman knew that a hoist fell, through the negligence of an employé, some days before

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MASTER AND SERVANT—Continued.

plaintiff's injury, did not charge defendant with knowledge thereof, so as to require a warning to servants of the danger. *Id.* 538.

11. A servant who was injured by a hoop thrown out of a planer because of a roller becoming loose in its box, and dropping down on one side, assumed the risk, where it appeared that a millwright repaired the box that morning in the same manner which had been customary for two months previous, and that, after being repaired, it would run for a time, and then drop out again, with which facts the servant was familiar, and that the danger was not concealed. *Fischer* v. *Goldie*, 574.

See CONFLICT OF LAWS; CONTRIBUTORY NEGLIGENCE (1, 3); RAILROADS (2, 3).

MECHANICS' LIENS.

1. Such changes by the owner from the original contract as are frequently made, in good faith, during the construction of a house, do not constitute such a waiver of the contract as will exclude its terms in determining his liability under the lien law. *Delray Lumber Co.* v. *Keohane*, 17.

2. A promise by the owner of a house to pay a subcontractor a balance due him from the contractor would not establish a lien against the owner's property which did not otherwise exist. *Id.* 18.

3. Where a contractor has abandoned his contract for the construction of a house, subcontractors and materialmen are entitled to liens for such a proportion of the amount of their claims arising before the abandonment as the contract price is of the actual cost of constructing the house in accordance with the original contract. *Id.*

4. 3 Comp. Laws, § 10734, does not require a laborer or materialman to make and file a statement of his claim of lien before it is assignable. *McAllister* v. *Des Rochers*, 381.

5. A clerical error in filing the statement of a lien, made in the honest belief that it is correct, will not subject the laborer or materialman to a forfeiture of his claim. *Id.*

6. Where a parcel of land occupied as a homestead is worth more than $1,500, the excess over $1,500 is liable for a laborer's lien under 3 Comp. Laws, § 10711, although the building contract is not signed by both husband and wife. *Id.* 382.

7. Where the testimony in a suit to foreclose certain liens upon a homestead shows that the house was substantially completed at the time the liens were filed, the value of the lot, the contract price of the house, the fact that it was taken too low, and that there were some extras, there is some evidence of the value of the property at the time the liens attached. *Id.*

See HOMESTEAD (2); RES JUDICATA.

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MERGER—See LIENS (1).

MISTAKE—See GIFTS (1).

MORTGAGES.

1. A bill to foreclose a mortgage is not multifarious for making former owners of the mortgage, who have guaranteed payment of the principal and interest of the mortgage debt, and also conveyed certain other lands to secure such payment, parties defendant, together with persons who have given or held additional security and subsequent mortgagees and grantees, where one and the same debt is secured by the original mortgage and all subsequent agreements. *Miller* v. *McLaughlin*, 234.

2. Complainant was the owner of a parcel of land covered by two mortgages. The first mortgage also covered two other parcels. Both mortgages were being foreclosed. Defendant purchased the property at foreclosure sale under an agreement with complainant that if he would bid in her parcel at the sale under the second mortgage, and bid the amount of the first mortgage for the two other parcels, the money advanced by him would be repaid. *Held*, that complainant, in order to compel defendant to convey to her the parcel owned by her before the sale, must pay him not only the amount bid at the sale of her parcel under the second mortgage, but also the amount paid for the two other parcels at the sale under the first mortgage. *Dayton* v. *Stahl*, 360.

3. Upon repayment to defendant of the amount paid by him for the two parcels under said agreement at the first-mortgage sale, complainant would be subrogated to the rights acquired by him in said property. *Id.* 361.

4. A statutory mortgage foreclosure sale of three lots, occupied by three distinct and separate tenancies, as one parcel, is void, although there was a fence around the entire tract. *O'Connor* v. *Keenan*, 646.

5. Where the original decree on the foreclosure of a mortgage determined the amount due, that defendant, among others, was primarily personally liable, directed a sale in case of nonpayment, and that any deficiency be reported, leaving open the question of defendant's rights under a discharge in bankruptcy, defendant could not resist a petition for a personal decree for a deficiency against him on the ground that his liability therefor was not determined by the original decree. *Field* v. *Howry*, 687.

See BANKRUPTCY (4); CHATTEL MORTGAGES; COLLATERAL SECURITY; COSTS; FIXTURES; PARTITION (2, 3); WILLS (7, 8).

MULTIFARIOUSNESS—See MORTGAGES (1).

MUNICIPAL CORPORATIONS.

1. Under 1 Comp. Laws, § 2908, giving villages general authority to contract for lights, the municipality may be held liable to

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MUNICIPAL CORPORATIONS—Continued.

pay for lights upon any evidence which convinces the jury that the service was rendered and accepted with the expectation that it would be paid for. *Howell Electric Light & Power Co.* v. *Village of Howell*, 117.

2. The renewal of a yearly contract for furnishing lights to a village will not be conclusively presumed from the acceptance of service after the expiration of the contract, where there is anything to show a contrary intention. *Id.*

3. Where a village had a written contract with an electric-light company for street lights for one year, and at the end of the year the company continued to furnish the lights, evidence that the company refused to enter into a new contract except at the old price and for five years, and that, one month after the termination of the contract, the council passed a resolution that it would not accept such terms, is admissible to show that the parties did not understand a renewal of the contract for a year had taken place. *Id.*

4. A member of the common council of a village incorporated under chapter 87, 1 Comp. Laws, who is the owner of land within a special assessment district, is not thereby disqualified from acting with the council in establishing the district and ordering the assessment. *Corliss* v. *Village of Highland Park*, 152.

5. A village sewer assessment, levied under 1 Comp. Laws, § 2856, amounting to 12½ per cent. of the assessed value of the property in the district, is void as to the excess over 5 per cent., which should have been assessed upon the village at large. *Id.*

6. Where a village council imposed the entire tax upon the property of a special assessment sewer district, in excess of the amount permitted by statute, it might correct the irregularity by making a new assessment for the same purpose. *Id.*

7. Where sewers have been constructed in a village, and the special assessment therefor is invalid because exceeding 5 per cent. of the value of the property in the sewer district, the court will compel the village council to make a new assessment, and to levy the excess upon the village at large. *Id.* 153.

8. Under section 2872, 1 Comp. Laws, a village council may borrow money in anticipation of a special assessment, but not to exceed the amount of such assessment. *Id.*

9. Where under 1 Comp. Laws, § 2856, providing that no assessment for more than 5 per cent. of the valuation of the property in any special assessment district shall be made in any one year for sewers, paving, grading, etc., a small portion of the land included in a sewer assessment district had been also included in a paving assessment district, but the owners of such lands made no objection to the assessment, the court, in ordering a new assessment, refused to deduct the amount of the paving assessment from such per cent. of the value of the

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MUNICIPAL CORPORATIONS—Continued.

property in the sewer district in determining the amount chargeable to the lands of complainant, which were not included in the paving district. *Id.*

10. A village organized under chapter 87, 1 Comp. Laws, has no power to extend a special assessment over a period of years. *Id.*

11. Where a city charter does not provide that a petition for paving or macadamizing streets shall be signed by any specific number or class of inhabitants, and does not expressly deny to the council the authority to levy a special assessment for such improvement without a petition, a landowner, knowing that a pavement is being laid, and making no objection until he files his answer to the tax petition of the auditor general, cannot complain that the petition to the council to "take immediate steps to repair and place the street in first-class condition" was not sufficiently specific. *Auditor General* v. *Hoffman*, 198.

12. A city charter provision that no resolution or proceeding of the common council imposing taxes or assessments, and no ordinance, shall be passed at the same meeting at which it is introduced, if there be any objection; and no ordinance shall be passed except by a two-thirds vote of the aldermen elect, —does not require a resolution imposing taxes to be passed by a two-thirds vote. *Id.*

13. The action of the common council of a city in passing a resolution that a special assessment roll, as reported by the city engineer, "be and the same is hereby accepted and adopted," will be treated as a confirmation, under a charter provision requiring that the common council shall by resolution confirm the same. *Id.*

14. It will not be presumed that a common council neglected to perform its duty in reviewing and examining a special assessment roll, as required by the city charter. *Id.*

15. A charter provision which requires notice that a special assessment roll has been completed to be given in two weekly publications of the official newspaper of the city, and allows two weeks from the first publication for filing objections, is not invalid for failure to provide reasonable notice. *Id.*

16. Where the charter requires the common council to review a special assessment roll and consider objections, it is competent for the legislature to leave the time and place of hearing to be determined by the council. *Id.* 199.

17. A city cannot maintain ejectment for the recovery of a park claimed by reason of a common-law dedication, on the authority of section 3154, 1 Comp. Laws (providing that the city may regulate the care of parks, and protect them from injury), in the absence of a showing that the city was organized under chapter 88, of which such section is a part. *City of St. Joseph* v. *Schulz*, 213.

18. Where, under a city charter providing that the cost of paving, but not repaving, shall be assessed upon the abutting prop-

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MUNICIPAL CORPORATIONS—Continued.

erty owners, a street, which has been paved, is paved again, including a portion of the street between the original pavement and the sidewalk, no part of the pavement can be assessed upon the owners of the adjoining property. *Wreford* v. *City of Detroit*, 348.

19. Under Act No. 303, Local Acts 1901, providing that, before paving a street, the town board shall declare the paving to be expedient, cause plans, specifications, and estimates of the cost to be made, submit to the electors the question of issuing bonds to defray the cost, and, with the highway commissioner, determine the details of the contract, the town board and highway commissioner may in good faith, after the election, issuing the bonds, and making the contract, change the grade of the street pavement. *Campau* v. *Highway Com'r of Grosse Pointe*, 365.

20. A resolution reciting the intention and understanding of the common council of a city that a bill would be introduced in the legislature to authorize the issue of bonds to construct a bridge, and directing plans and specifications and estimates to be made, together with other similar resolutions, is a sufficient compliance with a charter provision requiring the common council to declare by resolution its decision to make the improvement. *Kundinger* v. *City of Saginaw*, 395.

21. A charter which authorizes the board of public works to determine whether a public improvement shall be done by the city or be let by contract, and, if it determines to let it by contract, directing it to advertise for proposals for furnishing materials and performing the work, does not require a contract to be let to the lowest bidder. *Id.*

22. Where a city charter does not require the work of constructing a public improvement to be let to the lowest bidder, a contract for building a bridge is not illegal because made in pursuance of a resolution of the council requiring each bidder to furnish with his proposal a complete plan or drawing showing the style and kind of bridge he intended to construct. *Id.*

23. Where a city charter does not require a contract for a public improvement to be let to the lowest bidder, the awarding of a contract to a bidder is discretionary with the proper officials of the city, and their action, taken in good faith, is final. *Id.*

24. Where a city charter requires the board of public works to prepare, "so far as necessary, plans and specifications" for public improvements, and its members have exercised their best judgment, and have prepared plans and specifications which bidders can understand, the action of the board is not subject to review in the courts. *Id.*

25. Where a charter provision requires the common council, before levying a special assessment for an improvement costing more than $3,000, to set forth its intention in the preceding annual appropriation bill, the fact that an improvement costs

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MUNICIPAL CORPORATIONS—Continued.

more than was set forth in the appropriation bill does not render the tax void. *Auditor General* v. *Chase*, 630.

26. Under a charter providing that, when a street shall have been graded and paved at the expense of the abutting property owners, such property owners shall not be liable to any special assessment occasioned by any subsequent change of grade in such pavement, unless such change is asked for by a majority of the lot owners, such property may be assessed for the expense of repaving without such request, though a slight change of grade is made, incidental to the kind of paving material used. *Id.* 631.

See EQUITY JURISDICTION (3); INJUNCTION; PLATS; POLICE; PUBLIC HEALTH; TAXATION (7, 18); TELEPHONE COMPANIES.

MUTUAL INSURANCE—See FIRE INSURANCE.

MUTUALITY—See CONTRACTS (2); STATUTE OF FRAUDS (4).

NAVIGABLE STREAMS—See BRIDGES.

NEGLIGENCE.

1. Plaintiff's wife, after dark, but when the streets were well lighted, attempted to cross from the curb to a street car, a distance of 24 feet. When starting, she looked up, and could have seen defendant approaching with a horse and buggy, at a rate of six miles an hour. There was a controversy as to the distance he was from her at the time. His horse was under control, and, seeing her danger, he reined in his horse, which slipped, and fell upon the pavement, striking and injuring her. *Held*, that whether defendant was guilty of negligence, and plaintiff's wife of contributory negligence, were questions of fact for the jury. *Stroub* v. *Meyer*, 75.

2. It may be negligence, under some circumstances, to drive along a crowded city street at a less rate of speed than six miles an hour. *Id.*

3. Testimony by plaintiff that, while she was holding to the rail of a street car with her left hand, with her foot out to step on the ground, she heard the bell ring, became insensible, and, on regaining consciousness, found her left arm pulled out of its socket, warrants the jury in finding that the car started as she was alighting. *Bartle* v. *Houghton County Street-Ry. Co.*, 290.

See ATTORNEY AND CLIENT; CONFLICT OF LAWS; CONTRIBUTORY NEGLIGENCE; ELEVATORS; HIGHWAYS (1); MASTER AND SERVANT; NEW TRIAL (1, 2, 6); RAILROADS (1-3).

NEGOTIABLE PAPER—See BILLS AND NOTES.

NEW TRIAL.

1. Where a judgment against a street-railway company had no other foundation than the testimony of a girl 10 years old that the plaintiff's intestate, a child 2½ years old, was in front

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NEW TRIAL—Continued.

of the car, in plain view of the motorman, when the car started, while her testimony before the coroner's jury was that the deceased was clinging to the side of the car near the wheels, and the motorman testified that the child was not in front of the car, a motion for a new trial should have been granted. *Cole* v. *Detroit Electric Ry.*, 122.

2. The decision of the trial court in denying a motion for a new trial, based on the ground that the verdict was against the weight of the evidence, will not be reversed, where the only question was whether a street car was in motion at the time plaintiff attempted to alight, and her testimony that it was not in motion was corroborated by other evidence, although the conductor and six passengers testified that it was in rapid motion. *Bartle* v. *Houghton County Street Ry. Co.*, 290.

3. The Supreme Court has no power to enter a verdict contrary to the finding of a jury, but it may, under 3 Comp. Laws, § 10504, reverse the decision of the circuit judge denying a motion for a new trial; such action is not contrary to the constitutional provision securing the right to a trial by a jury, as it gives the party a right to a new trial by another jury. *Hintz* v. *Michigan Cent. R. Co.*, 305.

4. In determining whether a trial court should have granted a new trial, the Supreme Court will bring to the support of his decision all reasonable presumptions which arise from his superior opportunity to determine the credibility of witnesses. *Id.*

5. When it is apparent from the record, notwithstanding the presumptions in favor of the decision of the trial judge, that he erred in refusing to grant a new trial on the ground that the verdict was against the weight of the evidence, his decision will be reversed. *Id.*

6. In an action against a railroad company, plaintiff was the only witness who testified that the runaway of her team was caused by a collision with defendant's train; the trainmen testified that there was no collision, and several people residing near the crossing testified that her team ran away before reaching the crossing,—one that the train passed the crossing several minutes before the runaway. *Held*, that a verdict for plaintiff should be set aside as against the weight of the evidence. *Id.*

7. After two verdicts in favor of plaintiff have been set aside as against the weight of the evidence, the court is justified in refusing to set aside the third verdict in his favor for the same reason, where there is substantial evidence to support it. *Hyde* v. *Haak*, 364.

See TRIAL (5).

NOMINAL DAMAGES—See APPEAL AND ERROR (3); TROVER.

NOTARIES PUBLIC—See DEEDS (3).

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NOTICE.

1. Where the president of a paper company, without authority from the board of directors, executed a contract with a railroad company for the rebuilding and use of a side track to the paper mill, the occupancy and use of such side track by the railroad for one year gave the paper company constructive notice of the terms of the contract. *Michigan Cent. R. Co.* v. *Chicago, etc., R. Co.*, 324.

2. A grantee of such paper company, having knowledge of the side track and its location and ownership, is charged with constructive notice of the railroad's rights under the contract. *Id.*

See BANKS AND BANKING (4-6); CONTRIBUTORY NEGLIGENCE (1, 4, 5, 7); HIGHWAYS; JUDICIAL RECORDS (1); LANDLORD AND TENANT (4); MUNICIPAL CORPORATIONS (15); PLEADING (3-6).

NUISANCE—See DOGS (2).

OFFER—See SALE (5, 6); STATUTE OF FRAUDS (6); VENDOR AND PURCHASER (2-4).

OPINIONS—See EVIDENCE (9).

ORDINANCES—See TELEPHONE COMPANIES.

PARKS—See MUNICIPAL CORPORATIONS (17).

PAROL EVIDENCE—See BILLS AND NOTES (2-4); EVIDENCE (2, 3, 5).

PARTIES—See ACTIONS; EJECTMENT; HOMESTEAD (3); MORTGAGES (1); PARTITION (2); RECEIVERS (1, 3).

PARTITION.

1. A decree directing that a partition of lands be made cannot be reviewed on an appeal from the order confirming the report of the commissioners. *Austin* v. *Austin*, 453.

2. Under 3 Comp. Laws, § 11020, relating to the partition of lands, a mortgagee has a right to sell lands during partition proceedings therefor, and, upon failure to redeem, to become a party to the partition proceedings. *O'Connor* v. *Keenan*, 646.

3. Where a mortgage sale of lands pending partition proceedings is held void for failure to sell in parcels, the mortgagee should be permitted to resell upon failure to redeem within a time to be specified in the decree. *Id.*

PARTNERSHIP.

1. Where, under a partnership agreement for cutting and manufacturing timber, complainant was to furnish the timber, defendant to defray the expenses, and the proceeds were to be divided equally, and a large amount of timber was cut, defendant, who failed to make further advances, and forbade

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PARTNERSHIP—Continued.

complainant to sell the lumber, cannot thereafter claim profits which might have resulted from the successful operation of the enterprise. *Snyder* v. *O'Beirne*, 340.

2. On a bill for an accounting, unpaid accounts against a partnership should be paid by the receiver out of the assets, and not charged to either party. *Id.*

PARTNERSHIP ASSOCIATIONS.

1. Two months before the end of the term of a partnership association, on a notice to members of a meeting for the consideration of a final settlement of the partnership affairs and the distribution of its assets, a resolution was passed to exchange its assets for stock in a railroad corporation, and divide it among its members. *Held*, that this was a voluntary winding up of the affairs of the partnership association, and did not comply with the provisions of the statute (2 Comp. Laws, § 6087). *Emery* v. *Kalamazoo & Hastings Construction Co.*, 560.

2. A majority of the stockholders of a limited partnership association have no power to wind up its affairs by exchanging its property for stock in a corporation, and compelling a non-assenting shareholder to become a member of the corporation, and accept stock for his holding. *Id.*

See CORPORATIONS (18); ESTOPPEL (2).

PART PERFORMANCE—See STATUTE OF FRAUDS (2).

PATENTS—See SPECIFIC PERFORMANCE.

PAVING—See MUNICIPAL CORPORATIONS (18, 19, 26).

PAYMENTS—See ACCORD AND SATISFACTION; PLEADING (4); SALE (1); SUMMARY PROCEEDINGS; WITNESSES (9).

PERSONAL INJURIES—See CONFLICT OF LAWS; CONTRIBUTORY NEGLIGENCE (1, 3–7); DAMAGES (2); ELEVATORS; HIGHWAYS (1); MASTER AND SERVANT; NEGLIGENCE; NEW TRIAL (1, 2, 6); RAILROADS (1–3).

PLATS.

1. The approval of a plat whereby land is dedicated to the public use, required of the auditor general by 1 Comp. Laws, § 3372, if, in his opinion, it conforms to the act, cannot be made in his name by a clerk in his department. *City of St Joseph* v. *Schulz*, 213.

2. The commissioner of public works of Detroit cannot compel the owner of land, desiring to plat it, to dedicate and include in the plat the land that, according to the general plan of the city, would be within the limits of its streets when extended. *Owen* v. *Moreland*, 477.

PLEADING.

1. A party may recover under the common counts for work and

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PLEADING—Continued.

labor performed under a special contract fixing the price of the labor, where the contract is fully performed except to pay for the work and labor. *Morin* v. *Robarge*, 337.

2. In an action for killing "a certain beagle hound dog," a motion to take the case from the jury because the evidence showed the dog to be part fox and part beagle hound was properly denied, where the defendant did not object to the testimony, and admitted by his counsel that he killed the dog. *O'Neil* v. *Newman*, 489.

3. Nonjoinder of plaintiffs in an action on a joint contract need not be pleaded in abatement, or notice given under Cir. Ct. Rule 7. *Blackburn* v. *Blackburn*, 525.

4. Evidence of a release, which was in effect a payment or satisfaction of plaintiff's claim, was admissible in an action of *assumpsit* under a plea of the general issue, filed before the adoption of Cir. Ct. Rule 7. *Cleveland* v. *Rothschild*, 625.

5. A defense to an action on a fire-insurance policy, that, by a condition in the policy, a claim for loss is not due until 60 days after notice, and that, by statute, suit cannot be brought until 60 days after the claim is due, is not admissible under the general issue. *Putze* v. *Saginaw Valley Mut. Fire-Ins. Co.*, 670.

6. A notice which states that suit was prematurely commenced, that plaintiff had not complied with all the conditions of the policy, and had not waited as long as the law required after the claim became due before commencing suit, is sufficiently specific to admit of the defense that, under such policy and statute, suit could not be brought until 120 days after notice of the loss. *Id.*

See BILLS OF PARTICULARS; BRIBERY (2); CRIMINAL LAW (4, 6).

PLEDGE—See BANKS AND BANKING (3–5); HUSBAND AND WIFE (4).

POLICE.

1. An appearance and trial on the merits, before a police commissioner, of a charge to remove a policeman, under Act No. 416, Local Acts 1901, waives the requirement that the complaint should be under oath. *Oesterreich* v. *Fowle*, 9.

2. To determine what offense a policeman was charged with, and of what he was convicted, in a proceeding to remove him from office, the specifications must be examined, rather than the general language in the complaint and order of dismissal. *Id.*

3. It is provided by sections 5 and 10 of Act No. 416, Local Acts 1901, that the police commissioner of Detroit shall have power, for cause assigned, to remove and suspend policemen from office, and that any citizen or police officer may make a complaint touching the character or conduct of any policeman, or for violation of any of the rules of the police department, and that the police commissioner may make an order of removal

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POLICE—Continued.

of the accused officer. *Held*, that the commissioner's authority to remove is not limited to a violation of the rules of the department. *Id.*

4. A charge that a policeman reported himself sick, when he was at home, engaged in manual labor, "showing falsehood and deception in his report to his superior officers, prejudicial to good order and discipline," is more than a charge of absence from duty, and, upon conviction thereof, the commissioner is not limited to the penalty fixed by the rules for the latter offense. *Id.*

POLYGAMY—See MARRIAGE (2); TRIAL (9).

POSSESSION OF LANDS—See RAILROADS (4); SUMMARY PROCEEDINGS.

POWER—See WATERS AND WATERCOURSES.

PRACTICE IN CIRCUIT COURT.

1. Where there is no special verdict inconsistent with the general verdict, a judgment *non obstante veredicto* should not be entered. *Central Sav. Bank* v. *O'Connor*, 578.

2. A motion to strike from the files a suggestion of claim for *mesne* profits in an action of ejectment, for want of service and insufficiency, is not equivalent to an appearance, and a waiver of a want of service. *Thomson* v. *McMorran Milling Co.*, 592.

See AMENDMENTS; BILLS OF PARTICULARS; TRIAL.

PRACTICE IN SUPREME COURT—See APPEAL AND ERROR; MANDAMUS.

PRESUMPTIONS—See DEEDS (2); EVIDENCE (4, 8); JUDGMENTS (1); JUDICIAL RECORDS (1); LIFE INSURANCE (2); MUNICIPAL CORPORATIONS (2, 14); NEW TRIAL (4, 5); TELEGRAPH COMPANIES; TRUSTS AND TRUSTEES (2).

PRINCIPAL AND AGENT.

Where a paper company accepted the benefits of a contract of which it had constructive notice, but which it did not authorize its president to make, it will be presumed to have ratified the act of its president in making it. *Michigan Cent. R. Co.* v. *Chicago, etc., R. Co.*, 324.

See CORPORATIONS (1, 11); DEBTOR AND CREDITOR; EMBEZZLEMENT (2–4); HUSBAND AND WIFE (2, 3); INSURANCE (1); NOTICE (1); RAILROADS (5, 6); STATUTE OF FRAUDS (2); TAXATION (5, 6); WITNESSES (8, 9).

PRINCIPAL AND SURETY—See HUSBAND AND WIFE (4); STARE DECISIS.

PROBATE COURTS—See JUDICIAL RECORDS.

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PROMISSORY NOTES—See BILLS AND NOTES.

PUBLIC HEALTH.

1. Under the statute (2 Comp. Laws, § 4424) providing that, in certain cases, the expense of a village board of health, in caring for persons sick with diseases dangerous to the public health, shall be a charge against the county, provided the board shall render an itemized statement of its expenses, a village cannot bind the county by voluntary donations to its health officer, over and above the charges preferred by him for specific services. *Village of Durand* v. *Board of Sup'rs of Shiawassee Co.*, 448.

2. The proviso to section 4424, 2 Comp. Laws, "that the health board shall keep and render an itemized and separate statement of expenses incurred in so caring for each person," is mandatory. *Id.*

PUBLIC IMPROVEMENTS—See INJUNCTION; MUNICIPAL CORPORATIONS (4–16, 18–26).

PUBLIC OFFICERS.

Where the trustees of a school district required a contractor for building a schoolhouse to furnish the bond provided for by 3 Comp. Laws, §§ 10743–10745, and in good faith approved of the sureties, who justified that they owned sufficient property in Michigan, the trustees were not liable to one who furnished the contractor material, though the sureties were residents of Canada, and owned no property in this State. *Huebner* v. *Nims*, 657.

See CONSTITUTIONAL LAW; MUNICIPAL CORPORATIONS (4, 14, 23, 24); POLICE.

PUBLIC POLICY—See BENEFIT SOCIETIES (2); CONFLICT OF LAWS (2).

PURE-FOOD LAWS.

1. In a prosecution under the pure food law (2 Comp. Laws, § 5012) for selling a compound as lemon extract which was adulterated, the pharmacopœia formula may be taken as the standard for lemon extract. *People* v. *Jennings*, 662.

2. The statute does not prevent improving a common article of food where the law and spirit of the act defining adulteration are not infringed. *Id.*

3. The provision of 2 Comp. Laws, § 5012, that an article is adulterated, "*second*, if any inferior or cheaper substance or substances have been substituted wholly or in part for it," should be construed in connection with the following provision, "if any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it," and therefore means the substitution of a cheaper or inferior substance for an essential ingredient. *Id.* 663.

4. An instruction that if *any* ingredient of lemon extract, as defined by the pharmacopœia, was wanting in the extract

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PURE-FOOD LAWS—Continued.

sold by respondent, there should be a conviction, was erroneous. *Id.*

5. The provision of the statute prohibiting coloring an article, whereby damage or inferiority is concealed, has no application where the coloring matter employed in the manufacture of a lemon extract was not injurious to public health, and the difference from the standard article in other respects consisted only in the elimination of nonessential ingredients. *Id.*

QUESTIONS FOR JURY—See CONTRIBUTORY NEGLIGENCE (1–5); DEBTOR AND CREDITOR; DOGS (2); ELEVATORS (1); EMBEZZLEMENT (1, 4); HIGHWAYS (1); MASTER AND SERVANT (4); NEGLIGENCE (1, 3); RAILROADS (1); TRIAL (7, 8, 11, 16); WITNESSES (2, 4, 6).

QUIETING TITLE—See EQUITY JURISDICTION (4, 5); TAXATION (4).

RAILROADS.

1. The testimony of the plaintiff, under the circumstances of this case, that defendant's train struck the wagon in which she and her husband were crossing defendant's tracks in the highway, causing the team to run away, whereby she was injured, and that they stopped, looked, and listened before crossing the tracks, and heard nothing, made a proper case for the jury. *Hintz* v. *Michigan Cent. R. Co.*, 305.

2. A car inspector whose duty it is to supply safe machinery is not a fellow-servant of a freight conductor whose duty it is to operate the machinery. *McDonald* v. *Michigan Cent. R. Co.*, 372.

3. The conductor of a freight train tested the brakes on a car in the usual way, by setting and releasing them, before he started his train in the morning. At the third station from where the company's inspector examined the car, the conductor applied the brakes, when something gave way, and he was thrown under the car and injured. It appeared that the chain attached to the brake-mast below the platform had before that time parted, and been repaired with hay wire, which gave way under the strain. *Held*, that the conductor had neglected no duty imposed upon him by a rule requiring him to know that there was a reliable brake on the car. *Id.* 373.

4. A land contract by the terms of which the vendor agreed to convey a strip of land to a railroad company for a right of way when it should have definitely settled upon and located its line and determined upon the construction of the road, but giving no right of possession, even when construed in the light of the statute (2 Comp. Laws, § 6234), does not give the railroad company a right of possession that will constitute a defense to an action of ejectment, though the road has been constructed and possession maintained for a time. *Wilson* v. *Muskegon, etc., R. Co.*, 469.

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RAILROADS—Continued.

5. In a legal proceeding against a railroad company which has sold all its property to another company, service of process upon a ticket agent of the purchasing company does not confer jurisdiction, though the agent was formerly ticket agent for the defendant. *Thomson* v. *McMorran Milling Co.*, 591.

6. The provisions of the statute (2 Comp. Laws, §§ 6255, 6340) that, when a railroad company conveys its property to another corporation, the rights of pre-existing creditors shall not be prejudiced, and "all rights of creditors shall be preserved unimpaired, and the respective corporations shall continue to exist so far as may be necessary to enforce the same," do not authorize process in a suit against the selling company to be served on an agent of the purchasing company. *Id.*

See CONTRACTS (2, 3); CONTRIBUTORY NEGLIGENCE (2, 7); CORPORATIONS (18); LOG-LIEN PROCEEDINGS; NEW TRIAL (6); NOTICE; STATUTE OF FRAUDS (2).

RATIFICATION—See CORPORATIONS (14); PRINCIPAL AND AGENT; STATUTE OF FRAUDS (2).

REAL ESTATE—See FIXTURES; TITLE TO LANDS.

REASONABLE TIME—See STATUTE OF FRAUDS (6).

RECEIVERS.

1. Where a receiver has deposited trust funds in a bank in his own name, his executor is entitled to recover the same from the bank, for the purpose of delivering them to the receiver's successor, although the bank is interested in the fund. *Avery* v. *Preston Nat. Bank*, 445.

2. The court of chancery that appointed the receiver must determine the disposition of the trust fund which is in its custody. *Id.*

3. A receiver who has not rendered his final account or been discharged, whose bond is in force, and who has been authorized by the court to do so, may sue to recover assets of the estate, though previous to the suit the estate had been sold to him in a trust capacity. *Detroit Electric Light & Power Co.* v. *Applebaum*, 555.

See BANKRUPTCY (1-3); INTEREST; TAXATION (19).

REDEMPTION—See MORTGAGES (2).

RELEASE AND DISCHARGE—See PLEADING (4); TORTS; TRIAL (16).

REMOVAL OF OFFICERS—See POLICE.

REPEAL OF STATUTE—See CORPORATIONS (8-10).

REPLEVIN—See ESTOPPEL (3).

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REQUESTS TO CHARGE—See TRIAL (1, 2, 12).

RESCISSION—See TROVER.

RES JUDICATA.

A consent decree, dismissing a bill to enforce a mechanic's lien as to the owner of the land, is not a bar to a judgment creditor's bill or a bill in aid of an execution issued on the same decree against the owner's husband, who had furnished a large portion of the money for the building. *Brand* v. *Connery*, 88.

See APPEAL AND ERROR (10); JUDGMENTS (2).

RESTITUTION—See SUMMARY PROCEEDINGS.

RULES—See RAILROADS (3); SCHOOLS AND SCHOOL DISTRICTS.

SALE.

1. A purchaser of goods, who has secured a term of credit, cannot be made to anticipate the payments because the seller has obtained a commercial agency report of the purchaser which is not satisfactory. *F. W. Kavanaugh Manfg. Co.* v. *Rosen*, 44.

2. A manufacturer who, after accepting an order for goods and shipping a portion of them, obtains a commercial agency report of the purchaser which is unsatisfactory, and refuses to fulfill his contract, is liable to the purchaser for damages. *Id.*

3. The measure of damages for failure to deliver goods sold, where they can be obtained in the open market, is the additional cost of the goods; where they cannot be obtained in the market, the purchaser is entitled to recover the profits lost through the fault of the seller. *Id.*

4. Under a contract for the sale of heading at "$6.35 per 100 sets, delivered, less New York rates of freight; terms net 30 days from date of shipment," the title passes to the purchaser upon delivery of the heading to a public carrier, and the transmission of bill of lading, with invoice attached, to the purchaser, in compliance with the terms of the contract. *Althouse* v. *McMillan*, 145.

5. Plaintiff offered to buy 5,000 cords of wood of defendant. In reply defendant wrote that it would "proceed to get out wood" for plaintiff, providing certain changes in terms, which it proposed, were made, and that the balance of the terms were entirely satisfactory. By subsequent correspondence the proposed changes, which did not relate to the amount, were accepted. *Held*, that defendant, by writing, "The balance of the terms are satisfactory," contracted to deliver 5,000 cords of wood. *Scully* v. *Detroit Iron Furnace Co.*, 333.

6. An offer by plaintiff to accept less than the amount of wood contracted for upon certain conditions, which were not fulfilled, did not relieve defendant from liability for not delivering all the wood contracted. *Id.*

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SALE—Continued.

7. Where goods were sold with the privilege of exchanging them for other goods "within 15 days from date of invoice," the vendee had 15 days from the day they were shipped in which to exchange the goods. *Merchants' Exchange Co.* v. *Weisman*, 353.

8. An invoice, in commercial transactions, is a written account of the particulars of merchandise shipped or sent to a purchaser, with the prices and charges annexed. *Id.* 354.

See BAILMENTS; MORTGAGES (4); PARTITION (3); TIMBER; VENDOR AND PURCHASER; WATERS AND WATERCOURSES.

SCHOOLS AND SCHOOL DISTRICTS.

A principal of a public school, who enforces a rule of the school board requiring pupils to go directly home at the close of school, adopted under a statute conferring authority on the board to make rules relating to the good government of the schools and the welfare of the public concerning the same, is not liable for the damages sustained by the owner of a store arising from a loss of trade due to such enforcement. *Jones* v. *Cody*, 13.

See PUBLIC OFFICERS.

SECONDARY EVIDENCE—See EVIDENCE (2, 5, 6).

SEDUCTION.

1. Where, in a prosecution for seduction committed on the 30th of April, the complaining witness testified to previous acts of illicit intercourse with respondent in February and early in April of the same year, and there was no evidence of reformation on her part, the court should have directed a verdict of acquittal. *People* v. *Smith*, 58.

2. A person cannot be convicted of seduction whose only inducement to procure the illicit intercourse was a promise to marry the woman if she became pregnant. *Id.*

SELF-DEFENSE—See ASSAULT.

SEPARATE MAINTENANCE—See DIVORCE.

SERVICE OF PROCESS—See LOG-LIEN PROCEEDINGS; RAILROADS (5, 6).

SETTLEMENT—See ACCORD AND SATISFACTION.

SHIPPING—See CONTRIBUTORY NEGLIGENCE (3); MASTER AND SERVANT (3, 4).

SIDETRACKS—See CONTRACTS (2, 3); NOTICE; STATUTE OF FRAUDS (2).

SLANDER—See LIBEL AND SLANDER.

SPARROW BOUNTIES—See CRIMINAL LAW (6, 7).

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SPECIAL ASSESSMENTS—See MUNICIPAL CORPORATIONS (4–16, 18, 25, 26).

SPECIFIC PERFORMANCE.

Complainants contracted with a person to invent and patent a machine for them. Although the money was furnished according to the contract, it proved insufficient, and the work was stopped. Subsequently the inventor made an agreement with one having no knowledge of complainants' contract, to furnish money to complete the invention for an interest in it. The inventor died, and complainants filed a bill for specific performance. *Held*, that it would be inequitable to enforce the contract, especially against the defendant who had furnished large sums to complete the invention. *Booth* v. *Murdock*, 608.

STARE DECISIS.

The former decision that an appeal bond does not secure the payment of a decree otherwise secured, even if wrong, will not be overruled, as it would impose upon those who became sureties, relying upon it, obligations from which they had a right to suppose themselves exempted. *Reid* v. *Wayne Circuit Judge*, 406.

STATUTE OF FRAUDS.

1. A verbal lease which is to continue until the lessor can secure another tenant is capable of performance within a year, and, if terminated within that time, is not void under the statute of frauds. *Drew* v. *Billings-Drew Co.*, 66.

2. Where, in reliance upon a contract executed by the president of a paper company, a railroad company has rebuilt a side track to the paper mill, and used such track for one year, there is such a performance of the contract as will, in equity, take it out of the operation of the statute of frauds, and neither the authority of the president nor a ratification of his act need be in writing. *Michigan Cent. R. Co.* v. *Chicago, etc., R. Co.*, 324.

3. A verbal permission to remove fixtures, given by the purchaser at a foreclosure sale to the owner, cannot change realty into personalty. *Lord* v. *Detroit Sav. Bank*, 510.

4. Under the statute of frauds, making contracts for the sale of lands void unless the contract, or some note or memorandum thereof, is in writing and signed by the vendor, a contract for the sale of land, a memorandum of which is signed by the vendor only, is valid and binding on both parties. *Mull* v. *Smith*, 618.

5. A memorandum of a contract for the sale of lands, stating that the owner agrees to give a warranty deed upon payment of $275, subject to a mortgage of $250, is not so deficient in failing to state the particular mortgage, and its terms, as to make the contract void under the statute of frauds. *Id.*

6. An offer to sell land for $375 cash, which is accepted, and $100 paid, and a memorandum given by the vendor agreeing to

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STATUTE OF FRAUDS—Continued.

give a deed upon payment of $275, is an agreement to pay cash within a reasonable time, and sufficiently fixes the time of payment to comply with the statute of frauds. *Id.*

See TRUSTS AND TRUSTEES (5).

STATUTE OF LIMITATIONS.

1. The statute of limitations against an action for a breach of warranty under a deed of lands in Wisconsin, given when certain taxes were a lien on the land, begins to run from the date of recording the tax deed, as, under the laws of that State, the recording of a tax deed gives the grantee constructive possession, and amounts to an eviction. *Bray* v. *Fletcher*, 272.

2. The statute of limitations against an action for a breach of warranty is not suspended by reason of the grantor's authorizing the grantee to bring suit to clear the title, where the grantee settles such suit without the consent of the grantor. *Id.*

See DOWER (2).

STATUTES—See CORPORATIONS (8–10).

STOCK (CORPORATE)—See BANKS AND BANKING (1–5); CONSIDERATION (2); MANDAMUS (4).

STREET RAILWAYS—See NEGLIGENCE (3); NEW TRIAL (1, 2).

STREETS—See HIGHWAYS.

SUBROGATION—See MORTGAGES (3).

SUBSCRIPTIONS—See CORPORATIONS (3, 12–17).

SUGAR BEETS—See CONTRACTS (5); CORPORATIONS (11).

SUMMARY PROCEEDINGS.

No writ of restitution can issue upon the judgment of a circuit court commissioner for the possession of land, based upon the forfeiture of a land contract for failure to pay money due, where the defendant, within five days after final judgment, pays the amount found due, and double the amount of costs awarded. *Lambton Loan & Investment Co.* v. *Adams*, 350.

SUPPORT, CONTRACT FOR—See DEEDS (1).

SURRENDER—See LANDLORD AND TENANT (1).

TAXATION.

1. A contract for the sale of standing timber, which contains a provision that the title to the timber and manufactured products thereof shall remain in the vendor until paid for, that the vendee shall pay all taxes assessed upon the land, the usual forfeiture clause, and places the risk of damage to the timber upon the vendee, should be taxed as a credit to the

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TAXATION—Continued.

vendor, under 1 Comp. Laws, § 3831, subd. 6. *City of Marquette* v. *Michigan Iron & Land Co.*, 130.

2. A contract for the sale of land at a specified price, with the usual forfeiture clauses, and an agreement that the vendee shall pay all taxes assessed upon the land, should be assessed as personal property. *Id.*

3. The taxation of a land contract as personal property does not constitute such double taxation as to violate the constitutional requirement of uniformity in taxation, where the contract provides that the vendee shall pay the taxes on the land. *Id.*

4. The owner of the original government title to land, although not in possession, may maintain a bill in chancery to cancel tax deeds purchased by one in possession under an agreement with the owner to pay the taxes, on the ground that the title was bought in complainant's interest, and held by fraud. *Day* v. *Davey*, 173.

5. The evidence is *held* to be sufficient to show an arrangement that the tax deeds should be purchased in the interest of the original owner, provided it shall be made to appear that the agent purporting to represent the original title was in fact the representative of the owner. *Id.*

6. The complainant having, through an oversight, omitted to show the fact of such agency, the case was remanded for the purpose of permitting him to supply the proof. *Id.*

7. Const. art. 14, § 12, requiring all assessments to be on property at its cash value, does not permit an assessment on any other basis than actual value; and a provision in a city charter that wild and unimproved lands shall be assessed at their true cash value considering the location, and not according to any prospective or supposed value of such lands as city property, is invalid. *Saltonstall* v. *Board of Review of City of Cheboygan*, 196.

8. Objections to a tax which were not made in the contestant's answer to the petition of the auditor general will not be considered on appeal. *Auditor General* v. *Hoffman*, 198; *Auditor General* v. *Chase*, 630.

9. 1 Comp. Laws, § 3893, in limiting the power of a court of chancery to set aside decrees rendered in tax proceedings, is valid. *Cole* v. *Auditor General*, 262.

10. Subdivision 3 of section 98 of the general tax law (1 Comp. Laws, § 3921), providing that the auditor general may issue a certificate of error where the sale was in contravention of any provision of the act, applies only to errors occurring after the decree, and not to a case where the lands were held as State tax lands at the time the tax petition was filed. *Id.*

11. *Gurd* v. *Auditor General*, 122 Mich. 151, in so far as it sustains the power of the auditor general to review and set aside proceedings prior to the decree in a tax case, is overruled. *Id.* 263.

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TAXATION—Continued.

12. Where a supervisor fraudulently changed and reduced the valuation of certain lands on his assessment roll after the roll had been reviewed and completed, the entire tax roll was void. *Auditor General* v. *Hughitt*, 311.

13. 1 Comp. Laws, § 3899, providing that, if any fraud affects the amount of one tax only, the tax shall be sustained so far as the same is legal and just, does not apply to the fraudulent reduction of an assessment, since such reduction affects every taxpayer. *Id.*

14. The failure of the board of review to keep a record of its proceedings, as required by section 3856, 1 Comp. Laws, does not render invalid a tax against one who has suffered no injury by reason of such omission. *Auditor General* v. *Buckeye Iron Co.*, 454.

15. 1 Comp. Laws, § 3834, providing that, in computing the taxable property of an insurance company, the value of its real property shall be taken from its net assets above liabilities, and the remainder shall be the amount of personalty for which it shall be assessed, indicates an intention to tax the property of the company, and not a design to impose a franchise tax. *Detroit Fire & Marine Ins. Co.* v. *Hartz*, 518.

16. The reinsurance reserve fund of an insurance company is not a debt in the ordinary acceptation of the term, nor is it such a *bona fide* indebtedness as would entitle a taxpayer to an exemption of an equal amount of credits under subdivision 5 of section 3832, 1 Comp. Laws. *Id.*

17. Where, in assessing the personal property of an insurance company, the assessors have determined its assets from the report of the insurance commissioner, as directed by statute, and there is included in the assets $120,389 of United States government bonds, and the liabilities include an item of $241,727.72 reinsurance reserve fund, *mandamus* will not lie to compel the assessors to deduct the amount of the bonds from the taxable personal property. *Id.* 519.

18. A charter provision that all city taxes upon personal property shall be a lien thereon until paid, and no transfer of the property assessed shall operate to devest or destroy it, does not give the city a prior lien for taxes over the lien of a chattel mortgage given before the assessment. *Lucking* v. *Ballantyne*, 584.

19. A tax assessed against a chattel mortgagor cannot be enforced against a receiver appointed on the foreclosure of the mortgage, which was given before the property was assessed. *Id.*

See MUNICIPAL CORPORATIONS (4–16, 18, 25, 26).

TELEGRAMS—See EVIDENCE (5, 6).

TELEGRAPH COMPANIES.

It will be presumed that those in charge of receiving and transmitting telegrams perform the duties intrusted to them. *People* v. *Hammond*, 422.

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TELEPHONE COMPANIES.

1. Although a telephone company has a right to maintain a telephone exchange in a city under reasonable rules and regulations made by the city, yet it may, by accepting an ordinance, enter into contractual relations with the city, and be bound to perform the terms and conditions of the ordinance. *Mahan* v. *Michigan Telephone Co.*, 242.

2. Where a telephone company accepts a franchise containing a provision that its terms and conditions shall be binding upon any assignee, and that the assignee shall operate its lines under the ordinance, a competing telephone company which purchases all its tangible property, including the rights under the franchise, will be bound to furnish service to subscribers of the selling company at the rates fixed by the ordinance. *Id.*

See CONTRIBUTORY NEGLIGENCE (4); MANDAMUS (3).

TENANCY AT WILL—See LANDLORD AND TENANT (4).

TIMBER.

1. Where plaintiff's testator, who had sold defendant all the cedar timber on certain lands under an agreement that it should not be cut before the pine timber, which he was cutting for another person, and that all cedar not cut before a certain date should revert to him, failed to cut the pine by the date mentioned, plaintiff could not enforce a forfeiture of the cedar standing in the pine timber. *Small* v. *Robarge*, 356.

2. Neither could plaintiff in such case enforce a forfeiture of cedar not standing in the pine, and not cut on that date, as the right to insist on a forfeiture was not severable, and the performance of defendant's obligation was conditioned on the performance of the obligation of plaintiff's testator. *Id.* 357.

See TAXATION (1).

TITLE TO LANDS.

Interests in land cannot rest on estoppel alone. *Wilson* v. *Muskegon, etc., R. Co.*, 469.

See EJECTMENT; VENDOR AND PURCHASER (1, 5, 6); WILLS (6–8).

TITLE TO PERSONALTY—See BAILMENTS; SALE (4).

TITLE TO STATUTES—See CORPORATIONS (9).

TORTS.

A release of one or more joint tort feasors releases the others, although it be agreed that they shall not be discharged. *McBride* v. *Scott*, 176.

See BILLS OF PARTICULARS (1).

TOWNSHIPS—See CONSTITUTIONAL LAW; CONTRIBUTORY NEGLIGENCE (6); HIGHWAYS (1); MUNICIPAL CORPORATIONS (19).

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TRANSCRIPT—See JUDGMENTS (3, 4).

TRIAL.

1. It is not error to refuse a request to charge where the substance of the request is given. *Lincoln* v. *Felt*, 49.

2. Where there was no evidence that an attachment creditor (under whom defendant in a replevin suit claimed) had any information of reports filed by a manufacturing corporation with the Secretary of State, a request to charge that persons dealing with such corporations have a right to rely upon the fairness and honesty of the statements made therein, was properly refused. *Crossette* v. *Jordan*, 78.

3. An instruction that a certain agreement to pay for the board of a third person would constitute a set-off against a promissory note should not be given where there is no evidence to support such an agreement. *June* v. *Labadie*, 185.

4. A case will not be reversed for permitting a witness to state the contents of certain papers, where it appears that the court did not intend to rule that the contents were admissible, and immediately struck out that part of the testimony on the suggestion of counsel. *Varty* v. *Messmore*, 314.

5. It is only in a very clear case of misstatement of facts by counsel to the jury, which cannot be corrected, that the court will set aside the verdict. *Id.*

6. An instruction by the court that defendant admitted that a contract was made, upon which plaintiff entered and performed a large amount of work, was justified by the testimony of defendant's witnesses, though he was not present at the trial. *Morin* v. *Robarge*, 337.

7. Where, in an action for killing a dog, defendant claimed the dog was a trespasser and chasing his sheep, and one of plaintiff's witnesses testified that he saw defendant kill the dog, and that there were no sheep in the inclosure, but they were in an adjoining inclosure, feeding, the case was properly submitted to the jury. *O'Neil* v. *Newman*, 490.

8. A charge by the trial judge that he would leave the jury to determine whether they would believe uncontradicted testimony is not prejudicial error where there was no material point wholly uncontradicted. *Rhode* v. *Metropolitan Life-Ins. Co.*, 504.

9. In a prosecution for polygamy, where there was no evidence that the alleged former marriage of respondent's first wife was a sham marriage, it was error for the court to charge that, if the parties "merely went through a sham ceremony, then it was no marriage and no defense." *People* v. *Goodrode*, 542.

10. In a criminal prosecution the court instructed the jury that two witnesses were necessary to a valid marriage, and then that "it appears from the testimony that but one witness was present." *Held*, that a subsequent attempt to correct the charge by eliminating, "it appears from the testimony that but one witness was present," did not cure the error, as it

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TRIAL—Continued.

still left the jury to believe that two witnesses were necessary to constitute a valid marriage. *Id.* 543.

11. It is the province of the court to determine what testimony is admissible, and of the jury to determine the weight to be given it. *Id.*

12. Failure to give a request of respondent is not error where the subject is fully and fairly covered by the general charge. *People* v. *Gorsline*, 549.

13. The charge in this case, which, on the whole, was eminently fair, was not erroneous for being argumentative, and in condemning the admitted misconduct of respondent, as the language complained of was used in an attempt to prevent the danger incident to testimony regarding prior offenses. *Id.*

14. A statement by the court in his charge that an important fact was admitted, when it appears from the evidence that respondent had denied it, is error. *Id.*

15. A charge that, where a transaction admits of "either" an honest or a dishonest construction, it is the duty of the jury to accept the former, is erroneous. *Detroit Electric Light & Power Co.* v. *Applebaum*, 555.

16. Where defendant's testimony tended to establish a release, and plaintiff's that the arrangement was not concluded and the release never delivered, the question was one of fact for the jury. *Cleveland* v. *Rothschild*, 626.

See APPEAL AND ERROR (1, 9); LIBEL AND SLANDER (3, 4); NEW TRIAL; WITNESSES (2–7, 10).

TRIAL BY JURY—See NEW TRIAL (3).

TROVER.

Where, in a trade of lands for a stock of goods, plaintiff fraudulently misrepresented the character of the lands, and defendant seized the stock of goods two days before tendering a reconveyance of the lands, plaintiff was entitled to recover, in an action of trover for the technical conversion, not more than nominal damages. *Wilcox* v. *Morton*, 63.

TRUSTS AND TRUSTEES.

1. A conveyance of land in trust to sell for the benefit of creditors is authorized by statute (3 Comp. Laws, § 8839), and cannot be set aside on the ground that its effect is to hinder and delay other creditors. *Geer* v. *Traders' Bank of Canada*, 215.

2. The presumption is in favor of the validity of such a conveyance, and that it was executed for a lawful purpose. *Id.*

3. A trust deed for the benefit of certain creditors is not invalid because it contains a provision that the trustee may rent the property. *Id.*

4. The surplus remaining after the payment of the creditors for whom the trust deed was made cannot be reached by an attachment levy upon the land. *Id.* 216.

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TRUSTS AND TRUSTEES—Continued.

5. A voluntary conveyance, executed without fraud or mistake, and without any request by the grantee, between whom and the grantor no confidential relations existed, will not be set aside at the suit of the grantor, on the ground that it was given and accepted under a parol trust which has not been carried out. *Smith* v. *Marsh*, 407.

6. An incorporated volunteer fire department, preparatory to a dissolution, and after disposing of a portion of its property, converted the balance into money, and placed it in the hands of trustees, the income therefrom to be applied by them to the relief of poor and needy members of the corporation and their families, to the relief of any poor, needy, or disabled members of the present or future fire department, and to the relief of any other needy and worthy persons who might be designated from time to time by the trustees. *Held*, that the doctrine of charitable uses does not exist in this State, and the trust should be held void. *Hopkins* v. *Crossley*, 612.

See BANKRUPTCY; DEEDS (1); RECEIVERS.

USES, CHARITABLE—See TRUSTS AND TRUSTEES (6).

VACATION OF STREET—See HIGHWAYS (2, 3).

VARIANCE—See PLEADING (2).

VENDOR AND PURCHASER.

1. The purchaser under a land contract is the equitable owner of the property. *City of Marquette* v. *Michigan Iron & Land Co.*, 130.

2. An offer to sell lands at a certain price, and send the deeds to a bank on being informed that the price has been deposited, is not accepted by a letter directing the vendor to send the deeds, unaccompanied by evidence of the deposit required. *Dunn* v. *Dunn*, 461.

3. An owner of lands, who had proposed to sell, and send the deeds to a bank on being informed that the price had been deposited, did not waive the deposit by sending deeds to the bank with instructions to deliver on receipt of the price within four or five days, but thereby made a new proposal. *Id.*

4. An offer to sell lands if the price is paid within five days cannot be accepted by tendering the price after the five days, and after notice of the withdrawal of the offer. *Id.*

5. A person who has purchased land on a contract, and entered into a written agreement with three persons, assigning to each an undivided one-fourth interest, cannot, upon obtaining a deed from the vendor, convey a perfect title to another who has notice of the assignment. *Schwartz* v. *Woodruff*, 513.

6. A vendee in a land contract, who, knowing of an imperfection in the title tendered him, refused to accept the conveyance, and pay the balance of the purchase price, solely on the ground that he did not have the money, cannot defeat a suit

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VENDOR AND PURCHASER—Continued.

to foreclose the contract on the ground that the title tendered him was imperfect; but the decree should require the vendor to remove the cloud from the title. *Id.*

7. A vendor of land has a right to assert a lien upon the premises for the unpaid purchase price. *Lyon* v. *Clark*, 521.

8. A vendor's lien has priority over assignees in bankruptcy or a general assignee for the benefit of creditors. *Id.* 522.

9. The receipt of a note for the purchase price of land does not constitute a waiver of a vendor's lien. *Id.*

See FIXTURES (1); NOTICE (2); RAILROADS (4); STATUTE OF FRAUDS (2, 4–6); SUMMARY PROCEEDINGS; TAXATION (1–3); TIMBER.

VERDICT, SETTING ASIDE—See NEW TRIAL.

VESSELS—See CONTRIBUTORY NEGLIGENCE (3); MASTER AND SERVANT (3, 4).

VESTED INTERESTS—See WILLS (6, 7).

VESTIBULE TRAIN—See CONTRIBUTORY NEGLIGENCE (7).

WAIVER—See AMENDMENTS; BANKRUPTCY (5); BENEFIT SOCIETIES (3); JURISDICTION; MECHANICS' LIENS (1); POLICE (1); PRACTICE IN CIRCUIT COURT (2); VENDOR AND PURCHASER (3, 9).

WARRANTY—See STATUTE OF LIMITATIONS.

WATERS AND WATERCOURSES.

1. Complainant built a water-power canal, the power of which was placed at 66 run of stone, or 990 horse power, known as "first-class power;" all over that being known as "second-class power." Defendant purchased one run of first-class power and two runs of second-class power. The latter could only be used when the canal developed more than 66 run of stone. No run of first-class power took any priority over other runs of the same class, but defendant's two runs of second-class power took priority over other runs of that class of power. *Held*, that the fact that the canal had a capacity of 1,000 horse power, instead of 990, did not entitle defendant to the use of one and two-thirds first-class runs and one and one-third second-class runs. *Powers* v. *Perkins*, 33.

2. A decree that there could not be any second-class power until over 68,000 cubic feet of water was flowing into such canal per minute was a proper interpretation of the rights conferred by the owner of such water power. *Id.* 34.

3. Where a person purchases a certain amount of water power from the owner of an artificial waterway, constructed for the purpose of furnishing power, he is not entitled to a greater amount than he purchased, although there is water going to waste; and, if he uses more than he purchased, he must pay for it. *Id.*

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WATERS AND WATERCOURSES—Continued.

4. In this case the proof on the question of damages was very conflicting, and the finding of the lower court, who heard the evidence, was not disturbed. *Id.*

See BRIDGES; CONTEMPT (2).

WEIGHT OF EVIDENCE—See NEW TRIAL; TRIAL (11).

WILLS.

1. A motion for a new trial on the ground that there was no evidence of the execution of an instrument of testamentary character was properly denied, where there was testimony of the execution of a deed containing a description of certain land, and a statement that it should go to proponent after the grantor's death, and also proof that the grantor said she had given the property to proponent, "to take place after her death." *Lincoln* v. *Felt*, 49.

2. A deed which in form is to take effect after the death of the grantor may be admitted to probate as a will. *Id.*

3. The primary object in the interpretation of a will is to ascertain, if possible, the intent of the testator, and give effect to it. *Gregory* v. *Tompkins*, 205.

4. A will should be so construed as to give effect, if possible, to every part of it. *Id.*

5. A testator devised land to S., and charged her with the payment of $2,000 to A. To A. he gave $3,000, to be paid as soon as the estate was settled; $2,000 of it to be paid out of the share of S., and the balance out of any portion of the estate not specially devised. He directed his executors to use $2,500 to buy a home for A. within a reasonable time after his death, and to pay over to the parties entitled thereto the property left by him. *Held*, that A. was entitled to both $3,000, and $2,500 to be invested in a home. *Id.*

6. A clause in a will bequeathing to a son a one third interest in testator's real estate, followed by a clause directing the executor to keep the real estate together until the youngest granddaughter should arrive at the age of 21 years, rendering the net proceeds to the devisees according to their shares, unless he should think it would be better for all the heirs to make an earlier division, and providing that, if any heir should die before the youngest granddaughter should arrive at the age of 21 years, leaving no child, then his share should be divided equally among the surviving heirs, does not give the son a vested interest. *Garman* v. *Hawley*, 321.

7. A mortgage of his interest in real estate under such will by the son, who dies, without issue, before the youngest granddaughter arrives at the age of 21 years, cannot be foreclosed. *Id.*

8. The clause in the will providing that the executor should keep the real estate together, unless he should think it better to make an earlier division, does not empower him to direct or consent to a mortgage on the undivided interest of a devisee. *Id.*

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WILLS—Continued.

9. Under a will giving the property of the testator to his executor, to the intent that his wife should have the full use, benefit, and enjoyment of it for her life, with the remainder after her death to his children, the personal representative of the testator may recover from the wife the amount of money belonging to the estate, and in her possession at the time of the death of the testator. *Burns* v. *Burns*, 441.

See ESTATES OF DECEDENTS.

WITNESSES.

1. Where, in a proceeding in equity by the receiver of an insolvent bank to enforce an assessment against the estate of a stockholder, it was stipulated that the testimony of the cashier should stand as the testimony of the bank commissioner, such evidence is competent, although the cashier, as an officer of the bank, was disqualified to testify to those facts which were equally within the knowledge of the deceased person. *May* v. *Ullrich*, 6.

2. Where it cannot be said that a party's undisputed testimony is so clear, certain, and consistent that the jury are bound to accept it as conclusive proof, a verdict should not be directed in his favor by the court. *Goppelt* v. *Burgess*, 28.

3. Proponent, who asked to have a lost instrument, in the form of a deed, probated as a will, testified on a former trial that, after the death of the grantor, he saw the deed, and read the names of the witnesses and notary, who were strangers to him, and that he did not remember the names. On the second trial the evidence showed that he was acquainted with the notary and the witnesses before whom the deed was executed. *Held*, that a request to charge that the deed seen by proponent could not be the one executed before the witnesses and notary was properly refused. *Lincoln* v. *Felt*, 49.

4. Inconsistency between the testimony of a proponent and his testimony on a former trial affects his credibility only, and is a question for the jury. *Id.*

5. A witness, who testified that he knew of defendant's defalcation two years before he informed plaintiff, should have been permitted to explain why he withheld the information. *Adams* v. *Elseffer*, 100.

6. The jury are not bound to believe a witness whose testimony on direct examination not only differs from that on cross-examination, but is also inconsistent with the circumstances, although there is no other testimony bearing on the same question. *Preuschoff* v. *B. Stroh Brewing Co.*, 107.

7. Testimony by plaintiff, on rebuttal, of a conversation between himself and defendant's witness, objected to on the ground that the question had not been asked the witness, was not prejudicial, where its import was the same as that denied by the witness. *Morin* v. *Robarge*, 387.

8. Where an administrator brought suit upon a promissory note, testimony by defendant's husband in her behalf, to prove a

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WITNESSES—Continued.

set-off by sales of merchandise made for her by him, showed that he acted as her agent in making a contract involved in the suit, and was therefore inadmissible. *Gustafson* v. *Eger*, 387.

9. If such sales were made under an arrangement that they should be treated as payments upon the note, each payment involved a contract of purchase, and an agreement that the price should apply as payment, and the evidence was therefore inadmissible. *Id.*

10. It is error for a judge, in his charge to the jury, to refer to expert testimony as "boughten testimony." *People* v. *Jennings*, 663.

See ADMISSIONS (1); CRIMINAL LAW (1–3, 5); NEW TRIAL.

WORDS AND PHRASES: AGENTS—See EMBEZZLEMENT (3).
DUE—See FIRE INSURANCE.
INVOICE—See SALE (8).

WRIT AND PROCESS—See GARNISHMENT; JUSTICES OF THE PEACE; LOG-LIEN PROCEEDINGS; RAILROADS (5, 6); SUMMARY PROCEEDINGS.

WRITTEN INSTRUMENTS—See BILLS AND NOTES (2–4); EVIDENCE (3).

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